Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

SAFWAT H. SHAKIR, PETITIONER

*v.*

PRAIRIE VIEW A&M UNIVERSITY; TEXAS A&M UNIVERSITY SYSTEM; STATE OF TEXAS,

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Under a Title VII discrimination case, whether the Fifth Circuit erred in employing the "clearly better qualified" evidentiary and proof standard in determining comparative qualifications?

II. Whether a state university has the burden to demonstrate that a one-race selection committee is not discriminatory against an applicant?

III. Whether the Fifth Circuit departed from the accepted and usual course of judicial proceedings by disregarding significant evidence in granting a motion for summary judgment?

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## OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals of the Fifth Circuit is reported at *Shakir v. Prairie View A&M University, et al.*, 2006 U.S. App. LEXIS 10636 (5th Cir. 2006), and is reproduced in the Appendix to this Petition. Pet. App. 1a-10a.[1] In that opinion, the Fifth Circuit affirmed the lower court's granting of Defendants' Motion for Summary Judgment. That December 14, 2004 Memorandum Opinion and Final Judgment of the United States District Court for the Southern District of Texas, No. 4:4:03-cv-02445, is not reported and is reproduced in the Appendix to this Petition. Pet. App. 11a-38a.

## JURISDICTION

The Fifth Circuit issues its unpublished opinion on April 28, 2006. This petition for certiorari is timely in that Shakir has filed it within 90 days of April 28, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

**RELEVANT PROVISIONS INVOLVED** (see appendix)

## STATEMENT

This case presents an excellent vehicle for the Court to resolve the discrepant and disparate

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[1] The abbreviations employed for citations purposes are as follows: Pet. App. are citations to the Appendix attached to this Petition for Writ of Certiorari and R. are citations to the Record on Appeal at the Fifth Circuit.

application of a plaintiff's and a defendant's burden in Title VII cases.

Supreme Court Rule 10 identifies considerations employed by the Court to determine whether a petition for writ of certiorari should be granted. One consideration is that a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter...." Another consideration is that a "United States court of appeals has decided an important question of federal law...that conflicts with relevant decision of this Court." Lastly, an additional consideration is that a court of appeals decision may have "departed from the accepted and usual course of judicial proceedings...[so] as to call for an exercise of this Court's supervisory power...."

The Court's review in this case is warranted for all of these reasons.

## I. FACTUAL BACKGROUND

Shakir has been an instructor for fifteen (15) years at the predominately black university, Prairie View A&M University ("University"). He is white, of Egyptian origin, and a U.S. citizen. He holds a Ph.D. from the State University of New York and Syracuse University. As an instructor at the University, he had always received the highest faculty performance reviews, 4.0 out of 4.0. R.343-39. In addition to his duties as an instructor, Shakir was a founder and director of a research center funded by NASA, a researcher for more than fifteen (15) years, a recipient of grants from the Ford Foundation and other prestigious institutions, an author of a book, an author currently of more than thirty (30) published articles,

and a speaker at many international symposiums. Further, he had practical and relevant field experience in the United States and Germany and with the Egyptian Government.

In 2001, Shakir applied for the position of Research Scientist, a rank of associate professor, at the University. Pet. App. 2a; R. 446-33.

After the application period for the Research Scientist position closed, Dr. Nathaniel Keys ("Keys"), who is black, filed his application for the Research Scientist position. Pet. App. 3a. Keys did not have a single scholarly article, had never been a research director, had only five (5) years of total research experience, and had not been conducting research during the nearly twelve (12) years prior to applying for the Research Scientist position. R.587, 537-36, 222, 591, 307-06. As to his other qualifications on his curriculum vitae, Keys could not provide support for his credentials. Keys claimed he had worked with NASA although he had not; he claimed French award but had received a grade of "D"; and he claimed a teacher awarding but could not find support for it. R.222-21, 310-06.

A search committee was formed by the University to select the applicant for the Research Scientist position. The search committee was composed of all black members. The committee was chaired by Dr. Richard Griffin ("Griffin"). The applicants were ranked based on the total of the five (5) individual committee members' scores of each applicant. Pet. App. 2a-3a. Keys' score was 370; however, the only scoring sheet for Keys was completed by Griffin, who assigned Keys an individual score of 74. Griffin's individual score of 74 multiplied by five (5) equals 370, which was the ultimate score received by Keys. R. 402,

419-14. Griffin testified that he allegedly consulted the other committee members. Pet. App. 8a, 10a, n.3. Unlike Keys, the other applicants, including Shakir, received scores from the five individual committee members. Pet. App. 10a, n.3. Ultimately, Keys finished fourth in the rankings; Shakir finished nineteenth. Pet. App. 3a.

Beyond the questionable and belated ranking of Keys, the rankings did not have any rational relationship to research experience or scholarship of the applicants. Three of the top four applicants presented less than five (5) years experience, which is substantially less experience than Shakir. As to the applicant in the top four who presented substantial experience, the decision makers knew that that applicant was out of the country and was not expected to take the position. R. 223, R. 419-14, R.329. Further, Shakir's former post-Doctoral trainee, G. Whahid, who is black and whose research experience was gained solely under teachings of Shakir for three years, applied for the position and was ranked higher than Shakir. R. 223, 419-14.

In addition, the University declared that two of the applicants who received higher scores than Keys[2] were "not as highly qualified." R.329. Further, the University proffered the reason that "the top three candidates were no longer available or no longer interested in the position." R.206. Based on these various explanations, the University selected Keys for the Research Scientist position.

After the promotion of Keys, Shakir filed an internal complaint with the University. Pet. App. 3a.

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[2] That is, the two applicants who ranked higher than Keys but not the applicant who was out of the country and not available.

Considering the singular scoring sheet, the faculty investigation committee found Keys' score questionable. R. 419-14, 402. However, the University sustained the faculty's finding that Keys was not improperly selected.

## II. PROCEDURAL BACKGROUND

After the University completed its internal investigation, Shakir filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging race/national origin discrimination. After obtaining a right to sue letter from the EEOC, Shakir filed a suit in the Southern District of Texas alleging racial discrimination under Title VII. The district court granted the University's motion for summary judgment. Despite the questionable score of Keys and other evidence that the University's explanation was a pretext, among other things, the Fifth Circuit relied on the University's response that "Griffin consulted the other [committee] members" as to the singular scoring sheet of Keys. Pet. App. 8a, 10a, n.3.

## REASONS FOR GRANTING THE PETITION

### I. REVIEW IS NECESSARY BECAUSE THE FIFTH CIRCUIT'S BURDEN REGARDING COMPARATIVE QUALIFICATIONS IN A TITLE VII CASE IS UNREASONABLE AND IMPROPER AND BECAUSE THE CONFLICT AMONG THE COURTS OF APPEAL NEEDS TO BE RESOLVED

In this Court's recent decision, *Ash v. Tyson Foods, Inc.*, this Court stated that "some formulation other than [words jumping off the page to slap you in

the face] would better ensure that trial courts reach consistent results." 546 U.S. ___, 126 S. Ct. 1195, 1198 (2006) (per curiam). This Court found that the "slap in the face" test "is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications." 126 S. Ct. at 1197. This Court noted that, even though the federal courts have articulated various standards, *Ash* was not the occasion for the Court to define more precisely what standards should govern pretext claims based on superior qualifications. *Id.* at 1197-98.

In the Shakir opinion, despite that directive to another standard, the Fifth Circuit employed the "slap in the face" test after the *Ash* decision was rendered.[3] *See infra.*

The recognized inconsistency in the standard for comparative qualifications to prove intentional discrimination has created a stark conflict among the courts of appeal. The standards employed by, for example, the Fifth and Tenth Circuits impermissibly raises the bar for plaintiffs. Those courts of appeal employing the strict "clearly better qualified"[4] or "overwhelmingly better qualified"[5] standards impose a heightened standard on plaintiffs, and that heightened

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[3] The *Ash* decision is dated February 21, 2006, 126 S. Ct. at 1195, and the *Shakir* decision is dated April 28, 2006, Pet. App. 1a.

[4] *See, e.g., Deines v. Tex. Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 279 (5th Cir. 1999).

[5] *See, e.g., Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1319 (10th Cir. 1999) ("The disparity in qualifications must be 'overwhelming' to be evidence of pretext." (citations omitted)); *Paulsboe v. Farnam Cos.*, 1997 U.S. App. LEXIS 19990 (10th Cir. 1997) ("Absent evidence that one candidate is 'overwhelmingly better qualified,' pretext cannot be shown simply by comparing plaintiff's qualifications with those of the successful applicant.") (unpublished opinion).

standard is similar to the now-defunct pretext-plus standard. Especially with regard to motions for summary judgment, it is exceedingly difficult for a plaintiff to prove that they are more qualified, much less "clearly more qualified", at that stage. Whereas an employer need only rely on one criterion on which the plaintiff may have difficulty in unmasking the employer's intentional discrimination to prevail on a motion for summary judgment.

Further, that heightened burden employed by some courts of appeal is inconsistent with the broad inquiry prescribed by *Reeves*.[6] The courts of appeal requiring the increased quantum of evidentiary support to create an inference of discriminatory intent is leading to inconsistent results and significant differences among the courts of appeal.

Other courts of appeal employ a more helpful standard, in which the reasonableness of the employer's business decision is assessed in light of all circumstances. Such standard does not impose an unreasonable burden on the plaintiffs or defendants and is in line with *Reeves*. *See infra*. The bottom line is that unless this Court intervenes, many meritorious cases will be shut out of the judicial process because of the current disparity of the comparative qualifications standards among the courts of appeal.

### a. Review Is Warranted Because the Fifth Circuit Decision Is in Direct Conflict with the Court's *Ash v. Tyson* Decision

[6] *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133 (2000).

In Shakir's case, which was rendered post-*Ash*, the Fifth Circuit erroneously addressed the issue of superior qualifications by applying the "slap in the face" standard: "'[U]nless disparities in curricula vitae are so apparent as virtually to jump off the page and slap us in the face, we judges should be reluctant to substitute our views for those of the individuals charged with the evaluation duty by virtue of their own years of experience and expertise in the field in question.'" Pet. App. 7a (citations omitted).

This error by the Fifth Circuit only compounds the confusion among the courts of appeal as to what standard is appropriate in circumstances of comparative qualifications in Title VII cases alleging discrimination. This unacceptable error may be rectified by granting this petition for writ of certiorari.

### b. Certiorari Is Needed to Resolve the Conflict Among the Courts of Appeal and Because the Issue Is Important and Recurring

In accordance with the *Reeves* decision, a fact finder may infer that discrimination exists from the falsity of an employer's explanation; the plaintiff's burden is such that he or she may provide circumstantial and direct evidence by showing that the employer's alleged reason is not the real reason for the termination or other adverse employment action and thereby allowing the fact finder to infer discrimination. 530 U.S. at 147. As to qualifications, for example, if the employer alleged reason was that the selected employee was a better applicant, the fact finder may determine that the selected applicant was not actually a better applicant when the employer's judgment is so lacking in

merit as to call into question its genuineness. *See Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 577 (6th Cir. 2003). That is, the fact finder, not the court, must assess the reasonableness of a business decision when evaluating if that was the employer's real reason for selection. *Id.*

Especially at the summary judgment stage, placing the burden on a plaintiff to show that he or she is clearly or overwhelmingly better qualified is too heavy of a burden. Rather, it is the reasonableness of the employer's decision in light of all circumstances, including qualifications, that must be objectively assessed. Because some courts of appeals impose such a heightened burden on plaintiffs while others employ a reasonableness standard, this petition for review is necessary to resolve conflict.

### i. The Strict "Clearly Better Qualified" Standard

Often based in part on Fifth Circuit's *Deines* decision,[7] the clearly or overwhelmingly better qualified

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[7] *Deines*, 164 F.3d at 281-82 (concluding that the district court did not err in allowing the jury instructions to include jump off the page and slap you in the face language). In *Deines*, the Fifth Circuit described the now-improper jump off the page/slap on the face phrase to "be understood to mean that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." *Id.* at 280-81. The court further contended that the standard "does not alter the plaintiff's evidentiary burden to prove the fact of intentional discrimination by a preponderance of the evidence [; i]nstead...describes that character of this particular type of evidence that will be probative of that ultimate fact." *Id.* at 281.

evidentiary standard is employed in at least the Second, Seventh, Tenth and Eleventh Circuits. *See, e.g., Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1180 (7th Cir. 2002) (listing cases).[8] The Tenth Circuit has employed the phrase of "overwhelmingly better qualified"[9] and has described its evidentiary standard as "when two candidates are equally qualified in that they both possess the objective qualifications for the position and neither is **clearly better qualified**, it is within the employer's discretion to choose among them so long as the decision is not based on unlawful criteria." *Simms v. Okla . rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1329 (10th Cir. 1999) (emphasis supplied).

The Eleventh Circuit stated that the person must be "so clearly more qualified for the position...that a reasonable juror could infer discriminatory intent from the comparison." *Lee v. GTE Fla., Inc.*, 226 F.3d 1249 (11th Cir. 2000) (reversing denial of defendant's motion for judgment as a matter of law); *see also Cofield v. Goldkist, Inc.*, 267 F.3d 1264, 1268 (11th Cir. 2001) ("Cofield cannot, however, establish pretext simply by showing that she is more qualified than Bowen....The relevant inquiry

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[8] *See also, e.g., Byrnie v. Town of Cromwell Bd. of Educ.*, 243 F.3d 93, 103 (2d Cir. 2001) ("In effect, the plaintiff's credentials would have to be so superior to the credentials of the person selected for the job that 'no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.'" (citing *Deines*, 164 F.3d at 280-81)); *Runnels v. Tex. Children's Hosp. Select Plan*, 167 Fed. Appx. 377, 383 (5th Cir. 2006) (employing the "clearly better qualified" standard) (unpublished opinion); *Cichon v. Exelon Generation Co., LLC*, 401 F.3d 803, 813 (7th Cir. 2005).

[9] *Paulsboe*, 1997 U.S. App. LEXIS 19990, * 8 (unpublished opinion).

for us, then, is not to judge which employee was more qualified, but to determine whether any disparity between Bowen's and Cofield's managerial qualifications is so great that a reasonable fact-finder could infer that Goldkist did not believe Bowen to be better qualified." (citations omitted)).[10]

Adding to the confusion, the Seventh Circuit has contended that comparative qualifications alone are not enough as evidence of pretext, whereas others courts of appeal allow qualifications alone to be sufficient. *Compare, e.g., Millbrook*, 280 F.3d at 1178, *with Sanchez v. Philip Morris, Inc.*, 992 F.2d 244, 247 (10th Cir. 1993), *and Vessels*, 408 F.3d at 772. In the Seventh Circuit, the court made a significant distinction between cases relying solely on comparative qualifications and cases relying on comparative qualifications and additional evidence of discrimination. In *Millbrook v. IBP, Inc.*, the court reversed the denial of the defendant-employer's motion for judgment as a matter of law when the employee was not clearly more qualified and stated that "**a jury verdict for the employee cannot stand if the jury is simply disagreeing with the company as to who is best qualified.**" 280 F.3d at 1178 (emphasis supplied). The *Millbrook* court found that the employee was not

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[10] However, the Eleventh Circuit has also acknowledged that the disparity need not be so striking when other evidence is produced. *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 772 (11th Cir. 2005) ("Admittedly, our precedent makes clear that where an employee seeks to prove pretext through qualifications alone, the difference in qualifications must be so glaring that no reasonable impartial person could have chosen the candidate selected for the promotion in question over the plaintiff. However, where the qualifications disparity is not the sole basis for arguing pretext, the disparity need not be so dramatic to support an inference of pretext." (citations omitted)).

successful because the employee cited no additional evidence of pretext supporting a reasonable inference that the employer lied when it explained its rationale for selecting the applicant with superior qualifications. *Id.* 1182-82 & n.4. The dissenting opinion in *Millbrook* criticized the majority by stating that "[d]iscrimination is rarely overt....it is unfair to require plaintiffs to produce smoking guns," and it also questioned "how much additional evidence are we going to require to bolster the claim of a marginally better, or at least equally qualified, plaintiff who claims discrimination stopped him from getting a promotion." *Id.* at 1185 (dissenting opinion).

In contrast to the Seventh Circuit, other courts of appeal have acknowledged that comparative qualification standing alone may serve as evidence of pretext. *See, e.g., Sanchez,* 992 F.2d at 247 ("It is conceivable that a plaintiff in a case such as this could be so overwhelmingly better qualified than another applicant that on **this evidence alone** a trial court could properly find pretext and intent to discriminate." (emphasis supplied). For example, the Ninth Circuit stated:

> [W]e held that the plaintiff's superior qualifications standing alone were enough to prove pretext....Unlike the Tenth Circuit, we have never followed the Fifth Circuit in holding that the disparity in candidates' qualifications 'must be so apparent as to jump off the page'....This is especially true at the summary judgment stage, when we are compelled by the standard of review to infer from the pronounced difference between...qualifications that [the plaintiff] has demonstrated a genuine factual

> dispute as to whether the [defendant's] proffered reasons were pretextual."

*Raad v. Fairbanks N. Star Borough*, 323 F.3d 1185, 1194 (9th Cir. 2003) (citations omitted).

Such confusion and conflict among the circuits is recurring and needs to be resolved by this Court; this Court should provide a helpful, more precise standard for inferring pretext from superior qualifications.

### ii. The Heightened Evidentiary Standard Is Inconsistent with *Reeves*

The strict/heightened evidentiary standard employed by some courts of appeal is inconsistent with the broad parameters of pretextual evidence sought in *Reeves*. Specifically, a fact finder may infer that intentional discrimination exists from the falsity of an employer's explanation, and a fact finder may infer that an employer's reasoning of a better qualified candidate is false. 530 U.S. at 147.

In a Fifth Circuit case addressing a qualification comparison, the concurring opinion addressed the "thorny question" of whether *Reeves* undermined the "clearly better qualified" standard; the concurring opinion stated that the *Deines* opinion's "stated purpose of describing the 'quality' of evidence needed to established the 'ultimate fact' of intentional discrimination, sounds suspiciously similar to the requirement of additional evidence of intentional discrimination beyond proof of falsity that the Supreme Court found inconsistent with Title VII in *Reeves*." *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 884-85 (5th Cir. 2003) (J. Dennis concurring).

In more pronounced terms, the Fourth Circuit determined that the better qualified standard is inconsistent with *Reeves*:

> While claiming to adhere to the framework mandated in Reeves, the dissent would require more of plaintiffs by requiring them to meet the test specified in the pre-*Reeves* case of *Evans v. Techs. App. Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996). In Evans, this circuit held that plaintiffs such as Dennis are required to establish that they are better qualified for the position sought than those to whom the position is actually given. **Reeves plainly instructs us to apply a contrary approach by affirming that it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation.** 530 U.S. at 147. While the dissent argues that Evans is consistent with Reeves, we frankly do not see how its argument that 'the relative qualifications of competing employees are part of the analytical framework relevant to proving pretext' advances its argument. If, by this, the dissent means that an employee is required as a matter of logic to show that she was the superior candidate in order to refute an employer's claim that it hired somebody else for their superior qualifications, we respectfully disagree. One way to prove the plaintiff's case would certainly be to show that her qualifications were so plainly superior that the employer could not have preferred another candidate. **But an equally valid way to prove pretext is to provide evidence that the employer's proffered reason was not the**

> **actual reason relied on, but was rather a false description of its reasoning--albeit one based on a real difference in qualifications--manufactured after the fact.**
>
> Indeed, this is often the only way a plaintiff can reasonably be expected to show pretext. Employers are free within certain bounds to choose the criteria by which they may legitimately assess employees. In comparing any two employees, it is often the case that each is superior on at least a few of the possible criteria that could be used in assessing their qualifications. Given these facts, it is not farfetched to suppose that discriminatory employers might be likely to choose to emphasize at trial those characteristics on which their chosen candidates were superior in order to construct pretextual explanations that are as plausible as possible. If plaintiffs were required to show they were superior on the criteria chosen at trial by their employers, rather than being free to show that the criteria were not the ones actually used, the *McDonnell Douglas* framework would become a shield for employers rather than a tool to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. *See Burdine*, 450 U.S. at 255.

*Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 648, n.4 (4th Cir. 2002) (emphasis supplied).

Especially at the summary judgment stage, the plaintiff need not show that a disparity in qualifications

is so significant. A requisite showing need only be that the candidate is qualified for the position applied. Again, the focus should not be on the plaintiff's ability to prove significantly better qualifications, but rather, it should be whether the employer's explanation for the adverse decision was flawed in anyway, which may include comparative qualifications. *See, e.g., Holcomb v. Powell*, 433 F.3d 889 (D.C. Cir. 2006) (noting that the district court erred when it required a plaintiff to establish that she was significantly better qualified).

### iii. Differing Standards in Other Courts of Appeal

The conflict among the courts of appeal is stark and recurring. Beyond the strict "clearly better qualified" standard, other courts of appeal employ various and differing standards for qualification comparison.

In contrast to the strict standard, the Fourth Circuit employed a "better qualified" standard prior to the *Reeves* opinion, but after the *Reeves* opinion, that Circuit now allows the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. *See, e.g., Columbia Colleton Med. Ctr., Inc.*, 290 F.3d at 648, n.4.

Further, in the First Circuit, the standard employed is a modification of the business judgment rule; that court of appeals stated that

> When an employer claims to have hired or promoted one person over another on the basis of qualifications, the question is not which of the aspirants was better qualified, but, rather, whether the employer's stated reasons for

> selecting one over the other were pretextual. In a rare case, the disappointed applicant may be able to prove pretext by showing that she was in fact better qualified than the individual selected. But that is an uphill struggle: in the absence of strong objective evidence (e.g., test scores), proof of competing qualifications will seldom, in and of itself, be sufficient to create a triable issue of pretext.
>
> **This result follows from a form of the business judgment rule.**...In other words, subjective evidence of competing qualifications seldom provides a principled way for a factfinder to determine whether a given employment decision, even if wrong-headed, was anything more than "a garden-variety mistake in corporate judgment."

*Rathbun v. Autozone, Inc.*, 361 F.3d 62, 74 (1st Cir. 2004) (citations omitted) (emphasis supplied); *see also Rossy v. Roche Products, Inc.*, 880 F.2d 621, 625 (1st Cir. 1989) (cautioning that "[T]he reasonableness of the employer's reasons may of course be probative of whether they are pretexts. **The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one.**") (emphasis supplied).

Even further, other courts of appeal employ a similar but different reasonable business standard: "the reasonableness of a business decision is critical in determining whether the proffered judgment was the employer's actual motivation"; but these courts may disallow the invocation of the business judgment rule.

*See, e.g., Wexler*, 317 F.3d at 577.[11] In *Wexler*, the court held that the lower court was in error when it invoked the business judgment rule because it excluded consideration of evidence relevant to the question of pretext and ignored inferences that were favorable to the plaintiff. *Id.*

### iv. A Reasonable Business Standard Is Proper to Allow Inferences of Pretext from Comparative Qualifications

The Fifth Circuit's heightened evidentiary standard unreasonably obstructs a plaintiff from demonstrating that an employer's alleged reasons for an adverse employment decision were pretextual for

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[11] "Several of our sister circuits have similarly concluded that the reasonableness of a business decision is critical in determining whether the proffered judgment was the employer's actual motivation. *Aka v. Washington Hosp. Ctr.*, 332 U.S. App. D.C. 256, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc) ("If a factfinder can conclude that a reasonable employer would have found the plaintiff to be significantly better qualified for the job, but this employer did not, the factfinder can legitimately infer that **the employer consciously selected a less-qualified candidate--something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture**.") (footnote omitted); *Ryther v. KARE 11*, 108 F.3d 832, 840 (8th Cir. 1997) (holding that the factfinder was allowed to consider whether the survey that the employer relied upon as the basis for its decision to fire the plaintiff "was actually a sound--as opposed to pretextual--basis upon which to make employment decisions"); *Dister v. Cont'l Group, Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988) ("Thus, facts may exist from which a reasonable jury could conclude that the employer's 'business decision' was **so lacking in merit as to call into question its genuineness**.")...." *Id.* (emphasis supplied).

summary judgment purposes. The Fifth Circuit's strict formulation of evidentiary and proof standard is too narrow and contrary to the broad formulation of evidentiary proof permitted by *Reeves*.

The standard impermissibly usurps the fact finder's function to discern the true motives and reasons for an employment decision faced by plaintiffs while allowing courts to make factual and credibility determinations. The courts of appeal following the strict standard may fail to consider what an ordinary and reasonable employer may logically consider in its employment decision, thereby allowing the real discriminatory reason to remain thinly veiled by comparative qualifications and overlooking even an irrational employment decision to hire an employee who may be substantially less-qualified than the non-selected applicant under particular circumstances. Such weighing and balancing of particular circumstances is not in the province of the court but rather sits with the fact finders.

In the *Shakir* case, by imposing such a high comparative qualifications hurdle, the only common degree of qualifications that the Fifth Circuit reviewed for comparison purposes were that both Keys and Shakir held Ph.D.s and both had some agronomic projects. The court did not meaningfully evaluate the quality or quantity of these comparative factors. The court also did not evaluate other factors that an ordinary employer would reasonably evaluate, such as the inaccuracies in Keys' curriculum vitae. *See* Pet. App. 7a-8a. By imposing the high burden, the Fifth Circuit's alleged comparison completely disregarded simple and obvious qualifications that an ordinary and reasonable employer may scrutinize to assess applicants.

Distinguishable from the Fifth Circuit's outcome, under a reasonableness standard, an ordinary and reasonable employer under similar circumstance would not have meaningfully considered—much less selected—applicants with only five (5) years experience when another applicant presented fifteen (15) years experience. An ordinary and reasonable employer also would not have considered an applicant without any scholarly writing to be appropriate for the position of an associate professor. Nor would an ordinary and reasonable employer hire an applicant for a research position when an applicant presented no research experience for twelve (12) years immediately prior to the application.

Unlike the Fifth Circuit but consistent with *Reeves*, along with the evidentiary and proof standard of what an ordinary and reasonable employer would evaluate and review, other evidence demonstrating that the employer's proffered reason is pretextual should be considered. Not only did the Fifth Circuit failed to compare the qualifications, but it failed to taken into account all facts and circumstances to show that the University's reason was a pretext. In *Shakir's* case, the entire ranking process was a sham. The top three out of four applicants had less than five (5) years experience; the selected applicant, Keys, applied after the deadline and was chosen after the committee had ranked other applicants; the top three applicants were determined to be "not as highly qualified as Keys" despite receiving higher scores and at the same time they were declared to be "not available"; Shakir had been an instructor for more than fifteen (15) years at a predominantly black University; the selection committee members were all black, who selected a black applicant rather than Shakir who is white;

Shakir's former post-Doctoral trainee, who is black and presented limited research experience other than that under the direction of Shakir, actually scored higher than Shakir; and Keys was ranked by only one person in the selection committee, the chairman.

The Fifth Circuit's strict formulation is not workable and improperly invades the fact finder's province. To remedy this problem, this Court should grants this petition for writ of certiorari.

## II. REVIEW IS ALSO WARRANTED BECAUSE THE FIFTH CIRCUIT IS IN DIRECT CONFLICT WITH *DESERT PALACE*; THE COURT FAILED TO EMPLOY A PROPER STANDARD OF REVIEW IN DETERMINING WHETHER THE PROTECTED CHARACTERISTIC, RACE, WAS A MOTIVATING FACTOR IN THE CHALLENGED EMPLOYMENT DECISION

A plaintiff claiming discrimination under Title VII may successfully rely on either direct or circumstantial evidence to defeat a summary judgment. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). The Fifth Circuit erred by failing to treat the direct and circumstantial evidence alike. The Fifth Circuit stated: "The mixed-motive theory 'comes into play where **direct evidence** of discrimination is presented, but the employer asserts that the same adverse employment decision would have been made regardless of discrimination.'" Pet. App. 10a (demanding evidentiary proof of discriminatory comments) (emphasis supplied).[12]

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[12] While the Fifth Circuit has stated that it has adopted the mixed motive approach, in the *Shakir* decision, the court has emphatically continued to insist upon direct evidence of animus as a matter of

### a. THE *DESERT PALACE* DECISION MUST ALIGN WITH THE *MCDONNELL DOUGLAS* FRAMEWORK

A clarification by the Supreme Court is needed with regard to when and how the *McDonnell Douglas* framework may be modified by *Desert Palace. McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Desert Palace, Inc.*, 539 U.S. 90. Several courts of appeal have declined to modify the *McDonnell Douglas* framework. *See, e.g., Griffith v. City of Des Moines*, 387 F.3d 733, 735 (8th Cir. 2004) (determining *Desert Palace* to be "an inherently unreliable basis for district courts to begin ignoring this Circuit's controlling summary judgment standard"); *Cooper v. Southern Co.*, 390 F.3d 695, 725, n.17 (11th Cir. 2004) (reasserting the applicability of *McDonnell Douglas*); *Mereish v. Walker*, 359 F.3d 330, 340 (4th Cir. 2004) (refusing to apply the mixed-motive to ADEA and concluding that the *Price Waterhouse* standard still applied); *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 340-41 (5th Cir. 2005) (stating that "*Desert Palace* has no effect on pretext cases under *McDonnell Douglas*"). Further complicating the matter is the Supreme Court's decision in *Raytheon v. Co. v. Hernandez.* 540 U.S. 44 (2003) (reaffirming the *McDonnell Douglas* framework a post-*Desert Palace* decision).

The modified *McDonnell Douglas* framework is the product of legislation enacted two years after the

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course. *E.g., Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004); *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 353-54 (5th Cir. 2005); *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1506-07 (5th Cir. 1988) (pre-*Desert Palace*).

*Price Waterhouse* decision, in which Congress passed the 1991 Act. In *Desert Palace*, the Court stated that "In particular, § 107 of the 1991 Act, which is at issue in this case, 'responded' to *Price Waterhouse* by 'setting forth standards applicable in "mixed motive" cases' in two statutory provisions." *Desert Palace*, 539 U.S. at 94. ("[A]n unlawful practice is established when the complaining party demonstrates that race...was a motivating factor for any employment practice, even though other factors also motivate the practice." (quoting 42 U.S.C. § 2000e-2(m)). This Court further stated that "[t]he reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: '[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" *Id.* at 100 (citations omitted).

Under the modified *McDonnell Douglas* framework, the plaintiff may employ circumstantial evidence to show that the protected characteristic was a motivating factor in the challenged decision. Once the plaintiff has made the showing the burden of proof shifts to the employer to affirmatively demonstrate that the same decision would have been made even if the employee had not engaged in protected activity.

Evidentiary and proof requirements under Title VII raise important questions in federal law. In the *Shakir* decision, the Fifth Circuit regarded the only substantial evidence produced by Shakir to show that the protective characteristic was a motivating factor in the challenged decision was that the decision makers were all black and that Griffin, the chairman of the selection committee, may have been the only one to evaluate the selected applicant. Pet. App. 8a. The Fifth Circuit further stated that "the record is not clear....Shakir infers that only Griffin evaluated Keys,

and appellees reply that Griffin consulted the other members."[13] Pet. App. 10a.

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[13] At both at the district court and the Fifth Circuit levels, the court failed to consider critical evidence material to this case. Shakir, a white employee, had been an employee for fifteen (15) years at the University, a predominantly black university, at a rank of an instructor. He had authored more than thirty (30) publications, founder and director of a research center, received NASA and Ford grants, authored a book, and was invited to speak at many international symposiums. In contrast, a black, the selected applicant, appointed by colleagues of the same race, had five (5) years experience as a researcher, no research experience twelve (12) years preceding the application for the position, had no experience as head of a research center, no scholarly writings, nor any private grants for the position of an associate professor. Given the facts, the Fifth Circuit failed to consider the reasonableness of rankings.

In addition to comparable qualifications, the evidence also revealed that the total ranking score for Keys can be obtained by number of the selection committee members times Griffin's individual score. That is, Griffin's individual score of Keys was 74, the number of committee members was five, and Keys' total score was 370, suggesting an inference that it is highly unlikely that the other committee members would have ranked Keys in light of non-existence scoring sheets from any member except Griffin. R.402, 419-14. During University's internal investigation of the promotion of Keys, the faculty investigation committee itself questioned the suspicious circumstance of chairperson Griffin being the sole member to vote for Keys, who was the ultimately selected applicant. R. 419-14, 402 ("...only one evaluation sheet (the...Chairman [Griffin]) showed tabulated scores. It is not clear to the CFC [investigation committee] whether other four members evaluated Dr. Keys.").

Further, Shakir presented other evidence of pretext; both the district court and the Fifth Circuit ignored significant circumstantial evidence that a reasonable fact finder would find that race may have been a motivating factor in selecting Keys. The evidence revealed that the ranking order did not have any rational relationship to research experience or scholarship. R.223-22; 398-77. Only one of the top four finishers had substantial

For the purpose of determining whether the protected characteristic of race was a motivating factor[14] in the adverse employment decision, the burden should be imposed upon the state employer to justify that the one-race composition of the selection committee was not a motivating factor in an adverse decision against Shakir, who was of a different race than that of all of the selection committee members. The issue is all the more significant because the employer is a state university.

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research experience, but the decision makers also knew he was out of the country and did not expect to take the position. R.329. The next three top finishers had less than five years experience as researchers, and clearly had less experience than Shakir. R.223-22; 398-77. **In a University document, it expressly determined that the second and third ranked persons were "not as highly qualified" as Keys, the fourth ranked person.** R. 329. The University also proffered the reason for selection of Keys that **"the top three candidates were no longer available or no longer interested in the position."** R.206. In addition, the evidence is that at the time Key applied, the Search Committee had already scored the other applicants, thus allowing Keys to be scored with the knowledge of the relative ranking of other applicants. Pet. App. 12a. Despite the Fifth Circuit's determination that "[n]othing indicates presence of deadline," **the University's human resources director, Albert Gee, testified at his deposition that the deadline was extended.** *Compare* Pet. App. 6a *with* R.590 553-32. Finally, next to Shakir's name an arrow was drawn on the selection committee's ranking sheets, but no other applicant was similarly demarked on the ranking sheets. R.415.

[14] Martin Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment of Law*, 94 GEO. L.J. 489, 503 (2006) ("The 'motivating factor' formulation appears to have been developed, and has routinely have been employed, as the less restrictive causal standard [for employees] in a two-tier scheme in which the more restrictive standard is the 'but for' test.").

### b. SHAKIR'S RIGHTS ARE PROTECTED UNDER THE 14TH AMENDMENT AND THE UNIVERSITY HAS THE BURDEN TO JUSTIFY THE ONE-RACE SELECTION COMMITTEE

The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: "No State shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV. It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22 (U.S. 1948); *accord Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938); *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U.S. 151, 161-62 (1914); *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) ("a core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race").

The language of Title VII makes the plain the purpose of Congress to assure equality of employment opportunities for all races and to eliminate discriminatory practices between races. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971); *McDonnell Douglas Corp.*, 411 U.S. 792.

Strict scrutiny applies when race was "the *predominant* factor" motivating the drawing of district lines. *See, e.g. Miller v. Johnson*, 515 U.S. 900, 916 (1995) (emphasis added). Also, when a state is involved, all racial classification must be strictly scrutinized. *See, e.g., Gratz v. Bollinger*, 539 U.S. 244 (2003). In such a case, a university, such as in this case, has the burden to provide a compelling justification that a single race selection committee was not a racially motivating factor

in the challenged adverse employment decision. *See, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (finding that the lay off provisions were not so narrowly tailored enough to promote a compelling state interest).

The employment decision of a selection committee that consists solely of one race may be neutral on its face but may be unlawfully discriminatory. *Arlington Heights* v. *Metro. Housing Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Washington v. Davis*, 426 U.S. 229, 242 (1976) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."); *see Guinn* v. *United States*, 238 U.S. 347 (1915); *Lane* v. *Wilson*, 307 U.S. 268 (1939); *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) ("It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an 'unconstitutional condition.'").

An analogy can be made to the racial composition of juries. To avoid a racially motivated selection of jury, including all one race jury, a *prima facie* case of race discrimination can be made by offering a wide variety of evidence to determine whether proffered facts gave an inference of discriminatory purpose. *Batson v. Kentucky*, 476 U.S. 79 (1986) (criminal case); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991) (civil case); *Johnson v. California*, 545 U.S. 162 (2005). In such case, the burden is imposed on the party that wishes to claim peremptory strike on the basis of race.

Because the University's selection committee consisted of all black decision makers, the burden is on

that state employer to justify that the one-race composition of the selection committee was not a motivating factor the challenged employment decision. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose'...implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker...selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects.") (citations omitted); *Anderson v. City of Bessemer City*, 470 U.S. 564, 570-71 (1985) (reversing an appellate decision when the selection committee's explanation for its decision was pretextual).

Accordingly, because the single race composition of the University's selection committee may be a significant factor in the adverse employment decision against Shakir, along with other factors of pretextual evidence under the circumstances, given the mixed motive standard of *Desert Palace*, the Fifth Circuit decision should be reversed.

## III. REVIEW IS ALSO WARRANTED BECAUSE THE FIFTH CIRCUIT'S OPINION DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

The Fifth Circuit's failure to identify the facts creating genuine issues of material fact was such a departure from accepted proceedings, this petition for writ of certiorari should be granted. In the Fifth Circuit's opinion, the court failed to consider and identify material fact issues of pretext and/or properly construe the evidence most favorable to Shakir. Further, the court impermissibly assessed the

credibility of the University's proffered reason for summary judgment purpose, which is contrary to *Reeves*.

As discussed above,[15] Shakir presented evidence of substantially superior qualifications along with other evidence of pretext that a reasonable fact finder would not ignore and that created genuine issues of material fact. Rather than properly evaluating objective facts in light of Shakir's qualifications, the court granted the University's summary judgment based on the credibility assessments relating to the University's alleged reasons, a role which is the province of the factfinder. Accordingly, the Fifth Circuit's decision must be reversed.

## CONCLUSION

The Fifth Circuit's decision in the *Shakir* case ignored the now well-established rule that a broad-based circumstantial evidence must be a part of evidentiary proof in civil rights cases. The Fifth Circuit, and other courts of appeal, are able to circumvent *Reeves* by strictly following the ambiguous and heightened standard of "clearly better qualified." Consistency among the courts of appeal cannot be achieved by a clearly better qualified or any similarly heightened standard that invites unduly strict assessment of candidates. A more objective and reasonable standard, such as a business man's standard, can achieve more uniform and fair results among the courts of appeal. Rather than prematurely precluding justifiable Title VII civil rights cases by a summary judgment, a fact finder is the proper vehicle to discern

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[15] *See supra* fn. 13.

whether an employer's alleged reason for adverse employment decision was based actually on intentional discrimination.

Moreover, in this case, a state University is the claimed bad actor in this Title VII case. Shakir's contention is that as a white employee at a predominately black University and considering the substantial anomalies in the selection process, he was subjected to discriminatory employment decision by an all black selection committee. Our judicial history is clear that the state universities take leadership in the forefront of the enforcement of the civil rights cases. While the burden may not be appropriate today for private employers with regard to selection of all one race selection committee, this Court's ruling in *Batson* suggests the burden should be on a state university to provide affirmative reasons that can justify one race composition of selection committees.

For all the foregoing reasons, Petitioner, Dr. Safwat Shakir, respectfully requests that the Court grant review his petition for writ of certiorari.

Respectfully Submitted,

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No. 05-20010

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SAFWAT H. SHAKIR,
Plaintiff-Appellant,

v.

PRAIRIE VIEW A&M UNIVERSITY; TEXAS A&M UNIVERSITY SYSTEM; STATE OF TEXAS,
Defendants-Appellees.

April 28, 2006, Filed

NOTICE: RULES OF THE FIFTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL: For SAFWAT H. SHAKIR, Plaintiff - Appellant: Hak K Dickenson, Houston, TX.

For PRAIRIE VIEW A AND M UNIVERSITY; TEXAS A & M UNIVERSITY SYSTEM; STATE OF TEXAS, Defendants - Appellees: Merle Hoffman Dover, Assistant US Attorney, Office of the Attorney General, Austin, TX.

JUDGES: Before KING, BARKSDALE and PRADO, Circuit Judges.

OPINION BY: Edward C. Prado

OPINION: EDWARD C. PRADO, Circuit Judge: *

After being turned down for promotion, Appellant Safwat H. Shakir sued Appellees Prairie View A&M University ("Prairie View" or "the university"), the Texas A&M University System and the State of Texas (collectively, "appellees"), alleging race and national origin discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The district court granted appellees' motion for summary judgment, and Shakir appeals. For the reasons below, we AFFIRM.

I. Factual and Procedural Background

Shakir, a white Egyptian national, has worked as an instructor in the Computer Science department at Prairie View since 1989. He holds a Ph.D. in Soil Ecology-Terrestrial Community Ecology, is the author of multiple articles and one book on agricultural subjects, has fifteen years of lab experience, and has conducted field research for the Egyptian government.

In February 2001, the Cooperative Agriculture Research Center ("CARC") at Prairie View created a new full-time, permanent research position, "Research Scientist (Agronomist)." It posted a position announcement, which called for a "Ph.D. in Agronomy, Soil Science, Plant Science, or closely related discipline [and a] proven track record of conducting greenhouse and field research, and in managing resources." CARC director Dr. Albert Parks testified that Prairie View sought a candidate who had performed field research. The announcement indicated that the review of applicants would continue until the position was filled.

Parks established a selection committee to review candidates. Each member scored the candidates

according to four criteria: research, education, experience and knowledge, skills and ability. The scores were weighted and aggregated to into a point value, and candidates ranked accordingly.

Shakir applied for the agronomist position, as did Dr. Nathaniel Keys. Keys, who is black, has a Ph.D. in Horticulture/Entomology. He was employed by Prairie View as Program Leader in Agriculture and Natural Resources and the Project Director of the Small Farmer Outreach Training and Technical Assistance Project. Keys had experience working with farmers, participating in projects funded by outside grants and, for approximately five years, conducting lab research.

On July 24, 2001, Dr. Richard Griffin, the selection committee chair, sent a memorandum to Parks ranking the seven top candidates on a point scale. Keys ranked fourth, and Shakir was not on the list (he ranked nineteenth). Parks testified that the top three candidates either could not be reached or were no longer interested. Prairie View awarded the position to Keys. On November 19, 2001, the Prairie View Human Resources Department notified Shakir that he had not been awarded the position. Through February 2002, Shakir contested the decision through university channels. Several university inquiries determined that the committee selected the superior candidate.

On July 9, 2003, Shakir filed the present action; and, on June 10, 2004, Prairie View moved for summary judgment. The district court granted the motion, determining that Shakir failed to establish that Prairie View's proffered justification for failing to award the position to Shakir, that Keys was better qualified, was pretext. Shakir appeals.

II. Discussion

A. Standard of Review

We review a district court's grant of summary judgment *de novo*. Pegram v. Honeywell, Inc., 361 F.3d 272, 278 (5th Cir. 2004). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). An issue as to a material fact is "genuine" if the evidence would permit a reasonable jury to return a verdict for the non-moving party. Roberson v. Alltel Info. Servs., 373 F.3d 647, 651 (5th Cir. 2004)(citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). The evidence must be construed in the light most favorable to the non-moving party and doubts resolved in their favor. Id.

B. Summary Judgment

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny establish a burden-shifting analysis to be applied to discrimination claims. Once a plaintiff makes out a *prima facie* case of discrimination under Title VII, he or she is entitled to a presumption of discrimination, which the defendant may rebut by presenting a legitimate nondiscriminatory reason for its actions. Shackelford v. Deloitte & Touche, LLP, 190 F.3d 398, 404 (5th Cir. 1999). If the defendant succeeds in rebutting the presumption, the plaintiff must establish

that the defendant's proffered reason for its action is pretextual. Id. In "mixedmotive " cases, discussed infra, this court applies a modified version of the framework.

The district court determined that Shakir failed to establish that Prairie View's proffered legitimate nondiscriminatory reason for hiring Keys was pretextual.

1. Skewed Hiring Process

Shakir contends that an allegedly skewed hiring process establishes that Prairie View's justification for hiring Keys is a pretext for discrimination. He claims the process lacked credibility, rules were applied disparately in favor of Keys and the process was manipulated to favor Keys. Proof that an employer's justification is pretextual is enough to support survival of summary judgment on a discrimination claim. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). However, in instances such as when "the plaintiff creates only a weak issue of fact as to whether the employer's reason was untrue and there is abundant and uncontroverted independent evidence that no discrimination has occurred," no rational factfinder can conclude the action is discriminatory. Id.

Shakir first claims that the selection committee's alleged violation of its own rules render its justification unworthy of credence. See Laxton v. Gap Inc., 333 F.3d 572, 578 (5th Cir. 2003)(stating that where employer's proffered reason is unworthy of credence, no further evidence of animus is required). The committee choice of Keys over the second and third-ranked candidates, which appellees explain as the result of unavailability

and lack of interest, does not make Prairie View's claim that Keys (#4) was better qualified than Shakir (#19) unworthy of credence. Nor do the alleged procedural anomalies, which are little more than Shakir's disagreements with the committee's scoring or his observation that the committee members made immaterial addition errors in scoring.

Second, Shakir claims the hiring rules were disparately applied to favor Keys. His contention that a deadline was violated is based on testimony that the hiring process was closed and then reopened. Nothing indicates the presence of a deadline, and the position announcement indicated the search process would continue until the position was filled. Shakir points to the racial composition of the committee as a violation of university policy calling for selection committees to be "appropriately diverse." The district court found that this policy did not operate as a rule, and Shakir does not explain how the all-black committee operated in favor of Keys over Shakir in the context of a list of 26 candidates, the race of whom is unclear.

Shakir's third complaint about the hiring process is that it was manipulated to favor Keys. He claims the position announcement departed from an earlier position description form in order to emphasize field experience over research. Nothing save Shakir's bald assertions substantiates that any change was made in what the position required. In Price v. Federal Express Corp., a black Title VII plaintiff fit the actual letter of the job description better than a white candidate. 283 F.3d 715 (5th Cir. 2002). Because the white candidate chosen instead of the plaintiff had relevant skills and experience the employer found useful, we upheld

summary judgment. Id. at 718-22. Shakir's case is no better.

2. Clearly Better Qualified

Shakir also claims that summary judgment in appellees' favor was inappropriate because he was clearly better qualified than Keys for the position of agronomist. A plaintiff may rebut a defendant's promoted employee's superior qualification justification for the failure to promote as pretext by establishing that he, the plaintiff, was "clearly better qualified" for the position. Manning v. Chevron Chem. Co., 332 F.3d 874, 882 (5th Cir. 2003); Deines v. Texas Dep't of Protective & Regulatory Servs., 164 F.3d 277, 279-80 (5th Cir. 1999). However, "unless disparities in curricula vitae are so apparent as virtually to jump off the page and slap us in the face, we judges should be reluctant to substitute our views for those of individuals charged with the evaluation duty by virtue of their own years of experience and expertise in the field in question." Odom v. Frank, 3 F.3d 839, 847 (5th Cir. 1993).

Shakir's superiority is neither so acrobatic nor so pugnacious. He claims to have had more research and publishing experience than Keys, but the qualifications for the agronomist position were not so narrow. n1 Keys' record amply demonstrates his participation in a wide variety of agronomic projects, and both men had doctoral degrees in related fields and procured outside funding for their work. Remarks by Prairie View officials that Shakir was qualified do not resuscitate his argument. See e.g., Deines, 164 F.3d at 279 (upholding summary judgment for defendant where person charged with hiring concluded plaintiff met minimum qualifications). His allegation of inaccuracies in Keys'

curriculum vitae is simply unsupported. Taken together, Shakir's arguments regarding superior qualifications fail to hurdle the high bar our precedent sets for such a claim.

C. Mixed-Motive Analysis

Shakir claims that the district court improperly failed to apply the mixed-motive analysis for Title VII claims propounded in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). n2 A plaintiff may plead the mixed-motive alternative using either direct or circumstantial evidence of animus. Keelan v. Majesco Software, Inc., 407 F.3d 332, 340 (5th Cir. 2005).

The evidence Shakir presents in his pleadings is neither, and does not raise a material issue of fact as to whether Prairie View based its decision not to promote on his race or national origin. His only substantiated allegations-that the decisionmakers were all black and that Griffin *may* have been the only one to evaluate Keys n3 -are categorically unlike the discriminatory comments and policies that have led us to conclude the presence of a material issue of fact and deny summary judgment in past cases. See, e.g., Machinchick v. PB Power, Inc., 398 F.3d 345, 353-54 (5th Cir. 2005)(evidence of management's plan to hire a younger workforce, age stereotyping in the form of pejorative comments made about plaintiff's adaptability, retention of a younger worker where plaintiff fired and supervisor's question to plaintiff whether he planned to retire); Rachid, 376 F.3d at 305 (numerous ageist comments by the supervisor who terminated plaintiff); Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1506-07 (5th Cir. 1998) (managers commented that

worker unable to adapt and should look "sharp" in order to apply for other job).

Shakir goes no further than imputing a large amount of general unfairness to Prairie View. We have cautioned that, while anti-discrimination law works to safeguard the integrity of the employment process with respect to rooting out animus, it is not a palliative for all employment ills. "Whether the employer's decision was the correct one, or the fair one, or the best one is not a question within the jury's province to decide." Deines, 164 F.3d at 281. These are the questions Shakir wishes to put before a jury, and there they cannot go.

III. Conclusion

For the reasons above, the decision of the district court is AFFIRMED.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

n1 The position announcement reads: "the ideal candidate will have experience in soils and natural resources management, including field crops, forages, irrigation systems, and land use management, a proven track record of productive outputs (publications, extramural funding, etc.), strong oral and written communications skills, a demonstrated affinity for strategic planning, resource management, and evidence of ability to be a team player."

n2 The mixed-motive theory "comes into play where direct evidence of discrimination is presented, but the employer asserts that the same adverse employment decision would have been made regardless of discrimination." Rachid v. Jack in the Box, Inc., 376 F.3d 305, 309 (5th Cir. 2004).

n3 The record is not clear as to whether all the committee members evaluated Keys, because Griffin's scoring sheet was the only one in Keys' file. Shakir infers that only Griffin evaluated Keys, and appellees reply that Griffin consulted the other members.

DEC 14, 2004
No. 4:4:03-cv-02445

In the United States District Court for the Southern District of Texas.

SAFWAT H. SHAKIR,
Plaintiff,

v.

PRAIRIE VIEW A&M UNIVERSITY; TEXAS A&M UNIVERSITY SYSTEM; STATE OF TEXAS,
Defendants.

# MEMORANDUM OPINION

Pending before the court is the Defendants' Motion for Summary Judgment (Docket Entry No. 17) . The court has considered the motion, the parties' filings, and the applicable law. For the reasons discussed below, the Defendants' Motion is GRANTED.

## I. Case Background

In this action, Safwat H. Shakir ("Plaintiff"), a white male of Egyptian ethnicity, advances claims of race and national origin discrimination against Prairie View A&M University, Texas A&M University System, and the State of Texas ("the Defendants"). At the time he filed suit, Plaintiff worked as an Instructor in the Department of Computer Sciences, College of Engineering, at Prairie View A&M University ( "PVAMU" ) . The present dispute arose primarily out of his non-selection for a newly-created research position

in PVAMU's College of Agriculture and Human Science.

PVAMU is composed of several different colleges, one of which, the College of Agriculture and Human Science, included a research component, the Cooperative Agriculture Research Center ("CARC"). Dr. Alfred Parks ("Dr. Parks") served as the Director of the CARC. In February 2001, PVAMU created a new full-time, permanent research position in the CARC.fn1 The position's official title was "Research Scientist (Agronomist) . "fn2 The job posting stated that the selected candidate would be primarily responsible for "conducting research on soil and natural resources, with emphasis on soil and water management, field crops, forages, and pasture management."fn3

After the position was posted, Dr. Parks established a Search Committee, and named Dr. Richard Griffin ("Dr. Griffin") its Chair. The Search Committee used a scoring key that evaluated applicants in four categories: research; education; experience; and knowledge, skills, and ability. The maximum score an applicant could achieve was 500 points. Plaintiff applied for the job on March 4, 2001.fn5 Dr. Nathaniel Keys ("Dr. Keys"), the candidate ultimately selected, applied on or around June 15, 2001.fn6 At the time Dr. Keys filed his application, the Search Committee had already evaluated and scored twenty-five applications, and had submitted a report to Dr. Griffin.

On July 24, 2001, Dr. Griffin sent a memorandum to Dr. Parks listing the top seven candidates for the position.fn7 These seven candidates had scores ranging from 351 to 3 98 points. fn8 Plaintiff's score of 248

ranked him nineteenth out of the twenty-six candidates consdiered. fn9 Dr. Keys was given a score of 370, which placed him fourth.fn10 According to Dr. Parks, the top three candidates either could not be reached or were no longer interested in the position." Thus, Dr. Keys, as the next-highest ranked candidate, was hired.

On November 19, 2001, the Human Resources Department notified Plaintiff that he had not been selected for the Research Scientist position. The letter provided that, although Plaintiff's training and experience met the qualifications for the position, PVAMU had "decided to offer the position to an applicant with the qualifications that best meets the needs" of the CARC.fn12 On December 5, 2001, Plaintiff filed a formal complaint with PVAMU through its Human Resources Department." Plaintiff objected to the conclusion that he was not as qualified for the position as Dr. Keys. fn 11 Plaintiff also requested a comparison of his credentials with those of Dr. Keys, as well as disclosure of the selection criteria used by the Search Committee, his ranking compared to the other applicants, and the identity and qualifications of the Search Committee members.fn15

On January 9, 2002, Elizabeth Noel, Dean of PVAMU's College of Agriculture and Human Sciences, issued a report responding in kind to the concerns Plaintiff had raised in his complaint.fn16 The report included a comparison of the qualifications of Plaintiff and Dr. Keys, the selection criteria, Plaintiff's application ranking, and the identity and qualifications of the Search Committee members.fn17 Dr. Noel explained in the report that "Dr. Keys was selected based on the perception by the Committee ... that he would engage

in basic research related directly to the instruction program and work effectively with students."fn18 She further noted that "Dr. Keys has previously taught for the Agriculture Program and has extensive experience within [PVAMU's] extension system," and, thus, was "in the position to foster cooperative and collaborative interactions among research, teaching and outreach activities within the College."fn19

On February 18, 2002, Plaintiff filed a written appeal with the President of PVAMU, Dr. Charles H. Hines, claiming he had been treated unfairly by the Search Committee. fn20 Plaintiff informed Dr. Hines that, although he had received an answer to his complaints from Dr. Noel and Dr. E. Joahanne Thomas-Smith, Provost and Vice President of Academic Affairs, the answer "was not convincing and unacceptable.fn21

Plaintiff declared he had "been insulted [by] the search committee" because it gave him scores of 10 out of 20 in education and 8 of 20 in research, publications in peer-reviewed journals, presentations, and outside recognition.fn22 Plaintiff requested "an investigation [into] this matter" and an explanation as to "what basis the committee came up with the above grades for my education, skills, research and experience.fn23

On April 1, 2002, Dr. Thomas-Smith established a five-member Committee on Faculty Complaints ("CFC") to investigate Plaintiff's complaint.fn24 On June 11, 2002, the CFC gave Dr. Thomas-Smith the results of its investigation.fn25 The CFC Concluded that the Search Committee's members were fully qualified to screen the candidates for the Research Scientist-Agronomist position.fn26 The CFC observed that the score sheets

used by the Search Committee emphasized the "field nature" aspect of the position, rather than research based on journal publications or laboratory experiences, and that this emphasis was entirely consistent with the job description given on the position announcement.fn27 The CFC also noted that Dr. Keys' summary score sheet had only one evaluation form, filled out by Dr. Griffin, and that it was unclear as to whether the other members of the Search Committee had evaluated Dr. Keys.fn28

On July 22, 2002, Plaintiff addressed a letter to Dr. Thomas Smith, in which he complained that the statements made by the CFC regarding his non-selection were vague and non-explanatory.fn29 In particular, Plaintiff disputed the CFC's acceptance of the Search Committee's opinion that research in the "field" was distinct from research "based on journal publications or laboratory experience."fn30 Plaintiff also took issue with the CFC's statement that "[b]ecause [Plaintiff's] background was based on laboratory experiences, he was not ranked as one of the top seven candidates."fn31 Finally, he questioned the fairness of Dr. Keys receiving only one evaluation, and implied this showed the Search Committee "knew that the hiring of Dr. Keys was a done deal."fn32 Plaintiff asked Dr. Thomas-Smith to turn over Dr. Keys' resume and the minutes from meetings held by the search Committee and the CFC.fn33 He also requested "[t]he correction of [his] status from Instructor to Tenured Faculty.fn34

On August 8, 2002, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and its state

agency, the Texas Commission on Human Rights ("TCHR").fn35 In the charge, Plaintiff alleged that PVAMU had discriminated against him on the basis of race and national origin by failing to select him for the Research Scientist-Agronomist position.fn36 Nine months later, on May 7, 2003, Plaintiff amended the charge to include an allegation that he had been subject to discrimination in the form of disparate pay.fn37

On July 9, 2003, Plaintiff initiated this action.fn38 He amended his complaint on October 28, 2003, asserting claims of race and national origin discrimination in the workplace.fn39 He brings his claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C.§ 2000e et seq., and the Texas Commission on Human Rights Act ("TCHRA"), Tex. Lab. Code § 21.252 et seq. On June 10, 2004, the Defendants moved for summary judgment on Plaintiff's Claims.fn40 The court now directs its attention to that motion.

II. Summary Judgment Standard

Summary judgment is warranted only when the evidence presented to the court fails to raise any genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A dispute is "genuine" if the evidence would permit a reasonable jury to return a verdict in favor of the nonmoving party. Anderson v. Liberty-Lobby, Inc., 477 U.S. 242, 248 (1986) ; TIG Ins. Co. v. Sedgwick James of Washington, 276 F.3d 754, 759 (5th Cir. 2002). A fact is "material" if the relevant substantive law identifies it as one that may reasonably affect the outcome of the case. Liberty Lobby, 477 U.S. at 248;

Ameristar Jet Charter, Inc. v. Signal Composites, Inc., 271 F.3d 624, 626 ( 5th Cir. 2001) .

The movant must inform the court of the basis for a grant of summary judgment by identifying relevant excerpts from pleadings, depositions, answers to interrogatories, admissions, and affidavits on file, that deomonstrate the absence of genuine issues or material fact. Fed. R. Civ. P. 56 (c) ; Celotex Corp., 477 U. S. at 323; Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992). If the movant satisfies its burden, the adverse party must go beyond the pleadings and produce competent evidence which demonstrates that genuine issues of material fact do exist that must be resolved by a trier of fact. Fed. R. Civ. P. 56 (e) ; Celotex, 477 U.S. at 324. However, to withstand summary judgment, the adverse party must show more than "some metaphysical doubt as to the material facts." Meinecke v. H & R Block of Houston, 66 F. 3d 77, 81 (5th Cir. 1995). In other words, conclusory statements, unsubstantiated assertions, and speculation are not sufficient to raise material fact issues for trial. TIG Ins. Co., 276 F.3d at 759. When deciding whether the evidence creates a fact issue, the court resolves all doubts and draws all justifiable inferences in favor of the party opposing the motion. Liberty, Lobby,477 U.S. at 255; Fierros v . Tex. Dep't of Health, 274 F.3d 187, 190 (5th Cir. 2001) .

III. Legal Analysis

A. Title VII Claims

Title VII prohibits employers from discriminating against any individual with respect to his compensation,

terms, conditions, or privileges of employment, on the basis of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e2(a)(1). Claims of discrimination based only on circumstantial evidence are analyzed under the familiar burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973) . Price v. Fed. Express Corp. , 283 F.3d 715, 719-20 (5th Cir. 2002) . Under this scheme, a plaintiff must first establish a prima facie case of discrimination.Reeves v. Sanderson Plumbing Prods, Inc., 530 U.S. 133, 142-43 (2000); Price, 283 F.3d at 720. If the plaintiff is successful, discrimination is presumed, and the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the challenged employment action. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248,254-56 (1981) ; Price, 283 F.3d at 720. If the employer is able to state a lawful rationale for its employment action, the presumption dissolves, and the plaintiff must present evidence that the employer's proffered reason is merely a pretext for intentional discrimination. Reeves, 530 U.S. at 142-43; Price, 238 F.3d at 720. On summary judgment, in the third step, the plaintiff must adduce evidence sufficient to demonstrate that "discrimination lay at the heart of the employer's decision." Price, 283 F.3d at 720.

Plaintiff alleges race and national origin discrimination in the form of disparate promotion, pay, and tenure. He first claims that, during his twelve-year employment at PVAMU, the Defendants refused to promote him to the position of Assistant Professor and, instead chose to promote individuals who were not of his national origin (Egyptian) or race (white).fn41 He also claims the Defendants failed to select him for the Research

Scientist-Agronomist job." Plaintiff next alleges that he was paid less than PVAMU faculty members who were on tenure track or who had similar qualifications and experience. Finally, Plaintiff claims the Defendants refused to award him tenure.fn42

1. Failure-to-Promote Claim

Plaintiff first alleges the Defendants discriminated against him on the basis of race and national origin by failing to promote him from Instructor to Assistant Professor and by failing to select him for the Research Scientist-Agronomist position.fn44 The court will only address the latter of these two claims, as Plaintiff has not pointed to any specific instances where the Defendants denied him a promotion to Assistant Professor. Moreover, there is no evidence that Plaintiff exhausted his administrative remedies on this particular claim.

As to his claim about non-selection to the Research Scientist Agronomist job, Plaintiff must first establish a prima facie case of discrimination under the McDonnell Douglas three-part scheme. Reeves, 530 U.S. at 142-43. A plaintiff satisfies this burden on a failure-to-promote claim by showing: (1) he belongs to a protected group; (2) he was qualified for the position sought; (3) he was not selected for the position; and (4) the employer continued to seek applicants or else promoted an applicant with the plaintiff's qualifications. Davis v. Dallas Area Rapid Transit, 393 F . 3d 309, 317 (5th Cir. 2004) ; Celestine v. Petroleos de Venezuella SA, 266 F.3d 343, 355-56 (5th Cir. 2001). In their motion for summary judgment, the Defendants fail to address whether Plaintiff establishes a prima facie case of

discrimination and, therefore, appear to concede this point.fn45 As a result, the court will proceed to the remaining two steps of the analysis.

At the second step, the Defendants are required to articulate a legitimate, non-discriminatory reason for selecting Dr. Keys for the Research Scientist-Agronomist position instead of Plaintiff. Burdine, 450 U.S. 254-56. The Defendants explain simply that Dr. Keys "more closely conformed to the requirements of the Research Scientist position."fn46 This proffered explanation is sufficient for the Defendants to satisfy their burden of production. See Manning v. Chevron Chem. Co., 332 F.3d 874, 881-82 (5th Cir. 2003) (holding that the defendant met its burden of articulating a legitimate discriminatory explanation for failing to promote the plaintiff by merely stating that it hired the best qualified candidates) ; Price, 283 F.3d at 720-21 (finding that the defendant met its burden by explaining it did not hire the plaintiff because another applicant had superior qualifications) ; Jefferies v. Harris County Cmty. Action Ass'n, 693 F.2d 589, 590 (5th Cir. 1982) (stating that "the promotion of a better qualified applicant is a legitimate and nondiscriminatory reason for preferring the successful applicant over the rejected employee who claims that the rejection was discriminatory").

At the final stage of the analysis, the burden is placed back on Plaintiff to present evidence that raises a genuine issue as to whether the Defendants' proffered explanation was merely a pretext for race or national origin discrimination. Reeves, 530 U.S. at 142-43. In his response brief, Plaintiff argues first that he has presented a slew of evidence from which a reasonable

factfinder could conclude that the Defendant's explanation is either false or a pretext for race or national origin discrimination: (1) evidence that the Search Committee intentionally discriminated against him; (2) evidence that the Search Committee used numerical rankings to conceal its discriminatory intent; (3) evidence that Dr. Keys was not qualified for the position; and (4) evidence that the CFC failed to address all factors when it reviewed the Search Committee's selection process.

Plaintiff first contends that the Search Committee engaged in unlawful discrimination during the selection process.fn47 To this end, he maintains that the following evidence raises an inference of race or national origin discrimination: Dr. Griffin extended the application deadline to permit consideration of Dr. Keys' untimely application; Dr. Griffin was the only Search Committee member who evaluated Dr. Keys' application; the Search Committee members were each black and either knew or had worked with Dr. Keys in the past; and the Search Committee failed to verify Dr. Keys' qualifications for the position.fn48

First, Plaintiff's assertion that Dr. Griffin extended the job application deadline is simply not substantiated by the record. In fact, both the internal job posting and the position announcement stated in clear terms that the application period would remain open until the position was filled.fn49 Dr. Griffin confirmed this fact in his deposition.fn50 Plaintiff's reliance upon his own self-serving affidavit to prove otherwise is futile.

Plaintiff also contends Dr. Griffin was the only member of the Search Committee to evaluate Dr. Keys'

application.fn51 The evidence does conflict on this point. fn52 Nonetheless, this dispute does not constitute evidence of pretext because it is only over a fact which is immaterial to the outcome of the discrimination claim. In other words, even if Dr. Keys was graded by only one Committee member, and the other applicants were graded by all six Committee members, that fact would not give rise to an inference of discrimination. Instead, it would only tend to show the selection process may have been unfair. When attempting to establish that an adverse action was motivated by discriminatory animus, however, it is insufficient for a plaintiff to show merely that the employer made an unfair decision. Deines v. Tex. Dept of Protective and Regulatory Servs., 164 F. 3d 277, 281 (5th Cir. 1999) (stating that "[w]hether the employer's decision was the correct one, or the fair one, or the best one is not a question within the jury's province to decide."). Rather, the only issue to be decided is whether the employer's selection of another candidate over the plaintiff was motivated by unlawful discrimination. Id. Hence, Plaintiff's claim that the selection process was unfairly slanted in favor of Dr. Keys is irrelevant to the critical question: whether the Search Committee discriminated against Plaintiff because of his race or national origin.

Plaintiff also complains that each Search Committee member was African-American and that this violated PVAMU's policy that the Committee be "diverse."fn53 The policy cited by Plaintiff provided that search committees at PVAMU should "require that committee membership be appropriately diverse."fn54 No further explanation is provided as to the meaning of the term "diverse," either in the policy itself or the record as a whole. Plaintiff's contention that the term in fact means

"racially diverse" is simply speculation not supported by any evidence in the record.

On a related note, Plaintiff points out that all of the Search Committee members either knew or had worked with Dr. Keys in the past and that this injected bias into the selection process.fn55 This contention is meritless. First, there is no evidence in the record even suggesting that the Search Committee used subjective criteria in evaluating Dr. Keys, Plaintiff, or any other candidate. To the contrary, the evidence shows the Committee evaluated candidates based solely on objective measures such as education, experience, past research, and skills pertinent to the position. Second, even if the Search committee members had personal knowledge of Dr. Keys, that alone would not constitute even a scintilla of evidence that their reason for selecting Dr. Keys was motivated by discriminatory animus against Plaintiff's race or ethnicity. See Manning, 332 F.3d at 882 (holding that, even if an employer uses subjective criteria when making hiring decisions, that alone is insufficient evidence of pretext), Title VI I does not preclude an employer from hiring a candidate merely because the employer possessed knowledge of the candidate from past contacts. Rather, the statute only prohibits discrimination on the basis of a protected characteristic such as race.

Still focusing on the selection procedure, Plaintiff contends the Search committee's numerical rankings were a means to conceal the Committee's discriminatory intent.fn56 To this end, he claims the rankings did not accurately reflect the candidates' attributes.fn57 Once again, the court points out that Title VII is only a means for attaining redress of

discrimination, not unfairness, in employment decisions. Deines, 164 F.3d at 277. Plaintiff's claims regarding ranking, therefore, are irrelevant. Plaintiff also claims that the scores for the top four candidates were incorrectly tabulated.fn58 The court is unable to understand how the validity of the top four candidates' rankings is in any way material to the issue of whether the Defendants discriminated against Plaintiff, who was ranked only nineteenth.

Plaintiff next contends that the Defendants' justification for hiring Dr. Keys is false because Dr. Keys was not qualified for the position.fn59 More precisely, Plaintiff claims that Dr. Keys did not have "documented evidence of publications," or "seven or more years of leading research."fn60 The court finds Plaintiff's attempts to undermine Dr. Keys' qualifications fail to raise a fact issue as to whether the Defendants' justification for selecting Dr. Keys was false or a pretext for intentional discrimination. First, contrary to Plaintiff's claim, Dr. Keys was not required to have documented evidence of publications in peer-reviewed journals in order to meet the minimum qualifications for the job. The position announcement provided that the applicants were required to have "a proven track record of productive outputs (publications, extramural funding)." Thus, contrary to what Plaintiff would have this court believe, the candidates were not limited in their means of showing that they had a "proven record of productive outputs." Dr. Keys' resume shows that he participated in a number of "special projects" through PVAMU's Extension System prior to accepting the Research Scientist position. Dr. Keys testified that he received "extramural funding" for each of these Extension projects, as well as several

other projects on which he had participated.fn61 Plaintiff has not come forth with any evidence rebutting this testimony. In light of Dr. Keys' record of receiving extramural funding for research projects, the court cannot say that a dearth of peer-reviewed publications raises a fact issue as to whether Dr. Keys was ineligible for the position.

Second, the record shows that Dr. Keys engaged in extensive research applicable to the specific areas of study contemplated for the Research Scientist position. The job description provided that the selected candidate would conduct research on "soil and natural resources, with emphasis on soil and water management, field crops, forages, and pasture management."fn62

Dr. Keys' resume revealed that he had conducted several long-term studies in the past pertaining to these areas, such as "studies in the development of production systems for Chinese cabbage and sweet corn;" "studies into the use of foliar fertilizers in fescue, corn, tomato, and sunflower;" "a three year study into low input/sustainable agricultural practices at three major sites in Texas using wheat, barley, rye, oats, and watermelon;" "a two-year study to determine the usefulness of the vestigial glume character in the production of hybrid sweet corn;" and "a three-year study of sweet potatoes to determine the effects of growth regulators and other factors for slip production.fn63 This research was clearly relevant and could easily have constituted the minimum amount of research needed to qualify for the position. In sum, the summary judgment record shows there is no genuine

issue of material fact as to whether Dr. Keys was minimally qualified for the position.

Finally, Plaintiff attempts to establish pretext by presenting evidence that he was "clearly better qualified" than Dr. Keys for the job. See Manning, 332 F.3d at 882; Price, 283 F.3d at 723; Deines, 164 F.3d at 280-81. However, the Fifth Circuit has made clear that this an exacting standard. See Celestine, 265 F.3d at 357 (stating that "the bar is set high for this kind of evidence"). Plaintiff cannot show pretext, and thus withstand summary judgment, simply by proving he was as qualified or merely "better qualified" than Dr. Keys. See Odom v. Frank, 3 F.3d 839, 847 (5th Cir. 1993); EEEOC v.La. Office of Cmty. Servs., 47 F. 3d 1438, 1444 (5th Cir . 1995). Rather, he must show that his qualifications "leap from the record an cry out to all who would listen that the was vastly-or even clearly more qualified for the subject job."Odom, 3 F.3d at 847. This stringent standard is grounded in the common sense fact that "judges are not as well suited by training or experience to evaluate qualifications for high level promotion in other disciplines as are those persons who have trained and worked for years in the field of endeavor for which the applicants under consideration are being evaluated." Id.

Plaintiff contends he was qualified for the Research Scientist position because he is well-published in peer-reviewed journals; he has experience with practical agricultural-related field research; he has a track record of receiving grants for PVAMU, including a $500,000 grant from NASA; he has faithfully maintained his work in the agricultural field despite his teaching responsibilities in the Department of Computer

Science; and he is the Director of the Gulf Coast environmental Data Center .fn64 Plaintiff also points out that he received his Ph.D. in Soil Ecology from a "tier-1" university and other degrees from venerable foreign universities, while Dr. Keys received his degrees from low tier schools; that Dr. Keys does not have a single article in a peer-reviewed journal; and that Dr. Keys did not have any leading research during the twelve years preceding his appointment to the Research Scientist position.fn65

Despite Plaintiff's impressive credentials, the court cannot agree that his qualifications were so greatly superior to those of Dr. Keys as to make him "clearly better qualified" for the job. There are simply no glaring differences between the qualifications of the two men. Both Dr. Keys and Plaintiff conducted research into relevant areas and procured funding from outside sources. While it appears that Plaintiff accumulated a more impressive list of published works, Dr. Keys had degrees in disciplines which were more relevant to the Agronomist position.fn66 To be sure, Plaintiff did meet the minimum qualifications for the job, as the Defendants themselves have admitted. However, after reviewing the resumes of Plaintiff and Dr. Keys, the court is unable to conclude that Plaintiff's qualifications were superior to those of Dr. Keys, much less clearly superior.

In conclusion, Plaintiff has not adduced substantial evidence of pretext such that a reasonable trier of fact could conclude that the Defendants' stated reason for hiring Dr. Keys was false or a pretext for discrimination. Rather, he offers only his subjective opinion that he was more qualified for the position than

Dr. Keys. Without more, a plaintiff's subjective belief is not enough to show pretext. See La. Office of Cmty. Servs., 47 F. 3d at 1448 ("[A]n employee's subjective belief of discrimination, however genuine, cannot be the basis of judicial relief."). Accordingly, the court grants the Defendants' motion on this claim.

2. Disparate Pay Claim

Plaintiff also alleges that he was paid less than the African American faculty members in his department.fn67 Title VII prohibits discrimination in compensation based on an employees's race or national origin. 42 U.S.C. § 2000e-2(a)(1). For a plaintiff to establish a prima facie case of discriminatory compensation, he must prove that: (1) he is a member of a protected class, and (2) he was paid less than a nonmember for work requiring substantially the same responsibility. Williams v. Galveston Indep. Sch. Dist., 78 Fed. Appx. 946, 949 (5th Cir. 2003) (citing Uviedo v. Steves Sash & Door Co., 738 F.2d 1425, 1431 (5th Cir. 1981)

Plaintiff attempts to make out a prima facie case by comparing himself to two African-American faculty members in his department, J.D. Oliver ("Oliver") and Mertyle Thompkins ("Thompkins") , During the 2002-03 school year, Oliver earned $65,000, and Thompkins earned $54,000, while Plaintiff made $46,136.fn68 However, the undisputed evidence in the summary judgment record shows that Oliver and Thompkins both held the title of Associate Professor while, in contrast, Plaintiff was an Instructor.fn69 To make out a prima facie case of disparate treatment, a plaintiff must always show he was treated differently than others

who were "similarly situated." Okoye v. Univ. of Tex. Houston Health Sci. Ctr., 245 F.3d 507, 512 (5th Cir. 2001). The Fifth Circuit has expressly held that a non-tenure track professor is not "similarly situated" to a tenure track professor for purposes of a disparate treatment claim. Krystek v. Univ. of S. Miss., 164 F.3d 251, 257 (5th Cir. 1999).fn70 The evidence establishes that the position of Associate Professor at PVAMU was tenured while that of Instructor was non-tenured. Thus, Oliver and Thompkins are inappropriate comparators because they were not similarly situated to Plaintiff. In contrast, the proper comparator for Plaintiff is Ravindran Iyengar, the other Instructor in Plaintiff's department.fn71 The evidence reveals that Plaintiff earned a higher salary in 2002-03 than Iyengar.fn72 Thus, Plaintiff's claim of disparate pay does not have merit.

Plaintiff has failed to identify an instance where a similarly situated individual of another race or national origin received a higher salary. His comparisons to individuals holding higher rank do not raise a genuine issue of material fact as to whether he was subjected to discrimination in the form of less pay. Accordingly, the court will grant Defendants' motion for summary judgment on the disparate pay claim.

3. Tenure Claim

Plaintiff also makes a general allegation that the Defendants refused to grant him tenure because he is white and Egyptian.fn73 The Defendants argue that this claim is barred because Plaintiff failed to exhaust his administrative remedies. It is well-established that a plaintiff alleging employment discrimination must

exhaust his remedies at the administrative level before pursuing relief in federal court. Taylor v. Books A Million,Inc., 296 F. 3d 376, 378-79 ( 5th Cir. 2002). Exhaustion occurs when the plaintiff files a timely charge of discrimination with the appropriate federal or state agency and subsequently receives a right-to-sue letter. Id.; Vielma v. Eureka Co., 218 F.2d 458, 452 (5th Cir. 2000) . The Defendants do not dispute that Plaintiff filed a timely charge of discrimination with the EEOC and TCHR, that he validly amended that charge, and that he received a right-to-sue letter. Instead, they contend that Plaintiff failed to raise, in either his initial or amended EEOC charge, any claim pertaining to tenure.

In the Fifth Circuit, a Title VII claim may be based not only on the specific factual allegations made in the EEOC charge, but also on any kind of discrimination like or related to the charge's allegations, limited only by the scope of the EEOC's investigation which could reasonably be expected to arise out of the charge of discrimination. Thomas v. Tex. _Dep't of Crim. Justice, 220 F.3d 389, 395 (5th Cir. 2000) ; Fine v. GAP Chem. Co., 995 F.2d 576, 578 (5th Cir. 1993). At the outset, the court examines the language of Plaintiff's initial and amended EEOC charge. Plaintiff alleged in his initial charge that he "was denied a promotion to the position of Research Scientist (Agronomist) Job #01-55" because of his race and national origin. fn74 Nowhere in this charge does Plaintiff allege he had been discriminated against by being denied tenure. Instead, the charge was quite clearly limited to his complaint about not being selected for the Research Scientist position. In his amended EEOC charge, Plaintiff complained that he received less pay than others in his department:

I have been discriminated against by receiving disparate pay during my employment with [PVAMU]. Individuals who do not possess a Ph.D., but only a Master's Degree and/or have considerably fewer years of teaching experience are being paid at higher rates. I have my Ph.D., yet my current salary after serving [PVAMU) in the Department of Computer Science for 14 years is only $46,135.90 [per] 9 months, much less than others in the Department of Computer Science with fewer educational credentials and/or years of experience.fn75

Similar to his initial charge, it is plain that Plaintiff's amended charge was confined to a discrete issue, here, that he was paid less than his colleagues in the Department of Computer Science. Plaintiff's present claim that the Defendants refused to award him tenure is factually separate and distinct from these two claims.

Plaintiff nonetheless contends his "tenure" claim may proceed because it was encompassed within the EEOC's investigation.fn76 See Clark v. Kraft Foods Inc., 18 F. 3d1278, 1280 (5th Cir. 1994) (holding that the "investigation of a particular claim creates a strong inference that such a claim was presented" to the EEOC). To support his position, Plaintiff points to a letter written to the EEOC by his counsel that addressed the "tenure" issue.fn77 However, Plaintiff ignores the simple fact that this letter was dated July 31, 2003, which was three weeks after Plaintiff filed this action.fn78 Therefore, Plaintiff's reliance upon this letter to prove his point is misplaced. The EEOC could not have investigated any allegations relating to denial of tenure because this issue was only brought to its attention after it had issued Plaintiff a right-to-sue

letter. Without any other competent evidence that the EEOC investigated his tenure claim, Plaintiff's contention that this claim was exhausted at the administrative level falls by the wayside. The Defendants motion for summary judgment will be granted on this point.

B. TCHRA Claims

Plaintiff asserts identical claims of discrimination against the Defendants under the TCHRA.fn79 Similar to Title VII, the TCHRA prohibits discrimination against employees on the basis of various characteristics, including race and national origin. Tex. Lab. Code Ann. § 21.051. The Defendants contend that they are entitled to a grant of summary judgment on these claims because the Eleventh Amendment shields them from suit. The court agrees.

The Eleventh Amendment bars an individual from suing a state in federal court unless the state unequivocally consents to suit or Congress abrogates the state's sovereign immunity. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999); Perez v. Region 20 Educ. Serv. Ctr., 307 F.3d 318, 326 (5th Cir. 2002) ; see also U.S. CONST. amend. XI. The Fifth Circuit has repeatedly made clear that the TCHRA does not waive Texas' Eleventh Amendment immunity. Hernandez v. Tex. Dep't of Human Servs., 91 Fed. Appx. 934, 935 (5thh Cir. 2004); Perez, 307 F.3d at 332. Thus, existing Fifth Circuit precedent precludes Plaintiff from asserting TCHRA claims against the Defendants in this lawsuit."fn80 Accordingly, the court grants the Defendants' motion on these claims.

IV. Conclusion

Based on the afore-mentioned reasons, the Defendants' Motion for Summary Judgment is GRANTED.

Footnotes

fn1 Docket Entry No. 19, Exhibit 5.
fn2 Posting for Job #01-55, Docket Entry No. 17, Exhibit A.
fn3 Id.
fn4 Scoring Key for the Research Scientist-Agronomist position, Docket Entry No. 17 Exhibit C.
fn5 Plaintiff's Job Application, Docket Entry No. 17, Exhibit B.
fn6 Deposition of Nathaniel Keys, Ph.D., Docket Entry No. 17 ("Keys Depo.") at 86:2-4.
fn7 Memorandum from Dr. Griffin to Dr. Parks, dated July 24, 2001, Docket Entry No. 17, Exhibit D.
fn8 Id.
fn9 Search Committee score tabulations, Docket Entry No. 17, Exhibit E.
fn10 Id.
fn11 Deposition of Alfred L. Parks, Ph.D., Docket Entry No. 17 ("Parks Depo.") at 58:7-59:18.
fn12 Plaintiff's Formal Complaint, Docket Entry No. 17, Exhibit F (stating that he had received a letter containing this language).
fn13 Id.
fn14 Id.
fn15 Id.
fn16 Report of Dr. Elizabeth Noel, Docket Entry No. 17, Exhibit G.
fn17 Id.
fn18 Id.

fn19 Id.
fn20 Plaintiff's Appeal to Dr. Hines, Docket Entry No. 17, Exhibit H.
fn21 Id.
fn22 Id.
fn23 Id.
fn24 Letter from Dr. Thomas-Smith to Dr. Ronald Boyd, Mr. Peter Wood, Dr. Nancy Chiu, Dr. Clarissa Booker, and Dr. Kamel Fotouh, dated April 1, 2002, Docket Entry No. 19, Exhibit 10.
fn25 Report of the Committee on Faculty Complaints, Docket Entry No. 17, Exhibit I.
fn26 Id.
fn27 Id.
fn28 Id.
fn29 Plaintiff's Response to the Report of the Committee on Faculty Complaints, Docket Entry No. 17, Exhibit J.
fn30 Id.
fn31 Id.
fn32 Id.
fn33 Id.
fn34 Id.
fn35 EEOC Charge of Discrimination, Docket Entry No. 17, Exhibit K.
fn36 Id.
fn37 Amendment to EEOC Charge of Discrimination, Docket Entry No. 17, Exhibit K.
fn38 Original Complaint, Docket Entry 1.
fn39 First Amended Complaint, Docket Entry No. 9 ("Amended Complaint").
fn40 Defendants' Motion for Summary Judgment, Docket Entry No. 17 ("Motion for Summary Judgment").
fn41 Amended Complaint Par. 8.

fn42 Id Par 10.
fn43 Id Par 13.
fn44 Id. Par 10.
fn45 See Motion for Summary Judgment at 15-19 (arguing only that Plaintiff had failed to show pretext on this claim). Despite the Defendants, apparent admission, the court finds that the summary judgment evidence removes any doubt that Plaintiff has made out a prima facie case. Plaintiff belongs to discrete racial (white) and ethnic (Egyptian) groups; he met the minimum qualifications for the Research Scientist-Agronomist position for which he applied; he was not selected for the position; and Dr. Keys, an African-American, was hired instead. Cf. Price, 283 F.3d at 720.
fn46 Id. at 16
fn47 Plaintiff Shakir's Response in Opposition to Defendants' Motion for Summary Judgment, Docket Entry No. 18 ("Plaintiff's Response") at 13-15.
fn48 Id.
fn49 The job posting read: "Application review begins immediately and will remain open Until Filled." Job Posting for Research Scientist Position, Docket Entry No. 17, Exhibit A. The position announcement read: "Review of applications will begin immediately and will continue until the position is filled." Position Announcement, Docket Entry 19, Exhibit 23.
fn50 Deposition of Richard W. Griffin, Ph.D., Docket Entry No. 17 ("Griffin Depo.") at 37:8-9.
fn51 Plaintiff's Response at 5-6, 13-14; Plaintiff Shakir's Sur-Reply to Defendants' Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment, Docket Entry No. 21 ("Plaintiff's Sur-Reply") at n.8, n.10.
fn52 on the one hand, the CFC observed in its investigative report that Dr. Keys' summary evaluation sheet was incomplete because it contained scores from

only Dr. Griffin. See Report of the Committee on Faculty Complaints, Docket Entry No. 17, Exhibit I. However, Dr. Griffin explained that the other Committee members' scores would not have been on Dr. Keys' summary evaluation sheet because, at the time Dr. Keys submitted his application, the committee members had already turned in their score sheets to Dr. Griffin. Griffin Depo. at 92:810. Dr. Griffin further testified that he received the other Committee members' scores for Dr. Keys by phone. Id. at 92:10.

fn53 Plaintiff's Response at 14

fn54 PVAMU policy on "Employment Practices," Docket Entry No. 19, Exhibit 12.

fn55 Plaintiff's Response at 14.

fn56 Id. at 15.

fn57 Id.

fn58 Id. at 7.

fn59 Id. at 16-17.

fn60 Id. at 16; see also Position Description Questionnaire, Docket Entry No. 19, Exhibit 6 (stating that necessary qualifications for the job included "7 or more years in leading research; documented evidence of publications extramural funding").

fn61 Keys Depo. at 25:13; 95:15-25.

fn62 Posting for Job #01-55, Docket Entry No. 17, Exhibit A.

fn63 Dr. Keys' Resume, Docket Entry No. 19, Exhibit 17.

fn64 Affidavit of Safwat Shakir, Docket Entry No. 19, Exhibit 1 ("Shakir Aff.") Pars. 9-11, 13.

fn65 Id Par. 20 .

fn66 More specifically, Dr. Keys' resume shows that he holds three degrees in pertinent disciplines: B.S. in Biology, M.S. in Agronomy, and Ph.D. in Horticulture

(a sub-discipline of Agronomy). Docket Entry No. 19, Exhibit 17. In contrast, Plaintiff's degrees were not solely in Agronomy or Agronomy-related disciplines. For example, his Ph.D. was obtained in Environmental Science, with a specialization in "terrestial community ecology," i.e., the study of the relationship between living organisms and their environment.

fn67 Amended EEOC Charge of Discrimination, Docket Entry No. 19, Exhibit 8.

fn68 Docket Entry No. 19, Exhibit 21.

fn69 Id.

fn70 See also Wyvill v. United Cos. Life Ins. Co., 212 F.3d 296, 305 (5th Cir. 2000) (holding that differences between the plaintiff and his comparator, including their different jobs, was the basis for their differing treatment) ; Gettings v. Bldg, Laborers Local 310 Fringe Benefits Fund, 349 F.3d 300, 306 (6th Cir. 2003) (holding that the plaintiff, who asserted a disparate pay claim, was not similarly situated to a higher paid male because the two employees held different jobs).

fn71 See id.:

fn72 id.

fn73 More precisely, Plaintiff alleges, "Defendant refuses to award [me] tenure, but instead awards tenure to employees who are not of Egyptian national origin, ethnicity, alienage, race, and who are not white." Amended Complaint 13.

fn74 EEOC Charge of Discrimination, Docket Entry No. 17, Exhibit K.

fn75 id.

fn76 See Plaintiff's Response at n.29; Plaintiff's Sur-Reply at 11.

fn77 Docket Entry No. 18, Exhibit 19.

fn78 Id.

fn79 Amended Complaint Par. l.

fn80 The court notes briefly that PVAMU and the Texas A&M University System are Texas state agencies and, thus, are shielded from suit by the Eleventh Amendment to the same extent as the State of Texas itself. See Perez, 307 F.3d at 366 (stating that Eleventh Amendment immunity extends to state agencies); Leatherwood v. Prairie View A&M Univ., No. 01-02-01334-CV, 2004 WL 253275, at *2 (Tex. App.Houston [lst Dist.] Feb. 12, 2004, no pet. history) (holding that PVAMU was entitled to sovereign immunity because it is a state agency) ; Texas A&M Univ. v. Bishop, 105 S.W.3d 646, 652 (Tex. App.-Houston [14th Dist.] 2002, pet. granted) (noting that Texas A&M University is a state agency).

42 U.S.C. § 2000e-2(a)(1) prohibits the following employer practices:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(m) provides:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-5(g)(2)(B) provides:

On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court – (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission,

reinstatement, hiring, promotion, or payment described in subparagraph (A).

No. 06-139

# In the Supreme Court of the United States

SAFWAT H. SHAKIR,
*Petitioner*,

v.

PRAIRIE VIEW A&M UNIVERSITY, TEXAS A&M UNIVERSITY SYSTEM, AND THE STATE OF TEXAS,
*Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## RESPONDENTS' BRIEF IN OPPOSITION


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## BRIEF IN OPPOSITION

The Court should deny the petition for writ of certiorari because the court of appeals's non-precedential decision does not resolve any important question of federal law in a way that conflicts with relevant decisions from the Court or other courts of appeals.

Shakir urges the Court to grant review to resolve a purportedly "stark" conflict among the courts of appeals regarding the standard for evaluating comparative qualifications as evidence of pretext in Title VII cases. But Shakir mischaracterizes the circuits' standards and, as a result, inaccurately describes the nature and extent of the variation among those jurisdictions. In fact, the circuits have reached a near-consensus on the standard for evaluating pretext evidence, and any differences articulated by those circuits in the minority exist more in degree than in kind. Moreover, this case would be a poor vehicle for addressing such differences because Shakir—who was ranked nineteenth among twenty-six candidates for the position in question—has not shown that he could survive the summary-judgment stage under *any* standard.

Shakir also erroneously claims that the court of appeals's opinion presents important conflicts with three of the Court's decisions: *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006); and *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). *Reeves* is inapposite because its holding addresses a different aspect of a Title VII plaintiff's proof than the court of appeals's standard for evaluating comparative qualifications as pretext evidence. Although *Ash* disapproved a metaphor referenced by the court of appeals in describing this standard, that reference in a non-precedential opinion was surely harmless error because Shakir's pretext proof would fail in any event. Finally, the court of appeals cited and correctly applied *Desert Palace*'s standard for mixed-motive discrimination cases notwithstanding language in a footnote that Shakir misconstrues. The Court should deny the petition.

## STATEMENT

1. Prairie View A&M University, a member of the Texas A&M University System, is a public institution of higher education located in Waller County, Texas. TEX. EDUC. CODE §§87.101-.102. The University's College of Agriculture and Human Science includes a research department known as the Cooperative Agriculture Research Center ("CARC"). Pet. App. 12a. CARC's mission is to conduct "[r]esearch activities in the basic, applied and social sciences to produce information and technological developments which improve the social and economic conditions of targeted clientele in Texas, the nation, and the world." Prairie View A&M University, College of Agriculture and Human Sciences, Mission Statement, http://www.pvamu.edu/pages/304.asp (last visited Oct. 31, 2006).

In February 2001, CARC posted an announcement for a new, full-time, permanent research position titled "Research Scientist (Agronomist)." Pet. App. 2a. The announcement called for candidates with a "Ph.D. in Agronomy, Soil Science, Plant Science, or closely related discipline [and a] proven track record of conducting greenhouse and field research, and in managing resources." *Id.* Dr. Alfred Parks, CARC's Director, confirmed that CARC specifically sought a candidate with *field*-research experience—*i.e.*, "growing it outside in the field not in the lab." R.123; *see also* Pet. App. 2a. Such experience was integral to the position: the job announcement explained that the Agronomist would primarily be responsible for "conducting research on soil and natural resources, with emphasis on soil and water management, field crops, forages, and pasture management." Pet. App. 12a.

The job announcement stated that the position would "remain open until filled." R.331; *see also* Pet. App. 2a, 6a, 21a. Parks and Dr. Richard Griffin, the selection committee chair, confirmed the open application period. R.563, 566; Pet. App. 21a. Nothing in the

job posting or announcement indicated an application deadline. Pet. App. 6a, 21a.[1]

Petitioner Safwat H. Shakir, a white Egyptian national, applied for the Agronomist position in March 2001. *Id.*, at 2a, 12a. Shakir, who has a Ph.D. in Soil Ecology-Terrestrial Community Ecology, has authored multiple articles and one book on agricultural subjects, has accumulated fifteen years of laboratory experience, and has conducted field research for the Egyptian government. Pet. App. 2a. Since 1989, Shakir has worked as an Instructor in the University's Department of Computer Science. *Id.*

Dr. Nathaniel Keys, an African-American, applied for the Agronomist position in June 2001. *Id.*, at 12a. Keys, who has a Ph.D. in Horticulture/Entomology, had experience working with farmers, participating in projects funded by outside grants, and, for approximately five years, conducting laboratory research. *Id.*, at 3a. When he applied, Keys was the University's Program Leader in Agriculture and Natural Resources and the Project Director of the Small Farmer Outreach Training and Technical Assistance Project. *Id.*

Besides Shakir and Keys, twenty-four other candidates applied for the Agronomist position. *See id.*, at 12a-13a. The selection committee scored the applicants in four categories: (1) research; (2) education; (3) experience; and (4) knowledge, skills, and ability. *Id.*, at 2a-3a, 12a. This system also weighted the scores to emphasize certain qualifications, such as the field-research aspect

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1. For these reasons, Petitioner's assertions that CARC "belated[ly]" considered candidates "[a]fter the application period . . . closed" are incorrect. Pet. 3, 4. Petitioner's reliance on the testimony of Albert Gee, the University's Director of Human Resources, is misplaced because Gee testified that he did not have personal knowledge of the application period. *Compare* Pet. 25 n.13 *with* R.552-53.

of the position. R.82. The committee then ranked the applicants according to their scores. Pet. App. 3a. The committee had already evaluated and ranked Shakir and the other twenty-four candidates at the time Keys applied. *Id.*, at 12a.

Griffin sent Parks a memorandum ranking the seven top candidates according to their scores. *Id.*, at 3a, 12a. Keys ranked fourth. *Id.*, at 3a, 13a. Shakir was not on the list because his score ranked nineteenth among the twenty-six candidates. *Id.* Parks testified that, because the top three candidates could not be reached or were no longer interested, the University offered the position to Keys, who accepted it. *Id.*; R.329.

The University's Human Resources Department notified Shakir that he was not selected for the Agronomist position. Pet. App. 3a, 13a. This notice explained that, although Shakir met the position's qualifications, the University had "decided to offer the position to an applicant with the qualifications that best meets [CARC's] needs." *Id.*, at 13a.

Shakir filed an internal complaint with the University contesting the decision. *Id.*, at 3a, 13a. He objected to the selection committee's determination that he was not as qualified for the position as Keys and requested a comparison of his and Keys's credentials, the committee's selection criteria, his ranking, and the identity and qualifications of the committee's members. *Id.*, at 13a.

In response to Shakir's complaint, the College of Agriculture and Human Sciences issued a report that provided the information that Shakir had requested. *Id.*; R.62-67. The report further explained that "Dr. Keys was selected based on the perception by the Committee . . . that he would engage in basic research related directly to the instruction program and work effectively with students." Pet. App. 13a-14a. The report also noted that "Dr. Keys has previously taught for the Agriculture Program and has extensive experience within [the University's] extension system," and, thus,

was in a position "to foster cooperative and collaborative interactions among research, teaching and outreach activities within the College." *Id.*, at 14a.

Shakir appealed this resolution of his complaint, characterizing the report as "not convincing and unacceptable." *Id.* The University created a five-member faculty committee to investigate Shakir's appeal. *Id.* This investigative committee determined that the search-committee members were fully qualified to screen applicants for the Agonomist position. *Id.* It also concluded that the scoring system "was applied fairly to Dr. Shakir," R.410, and that Shakir had not been ranked among the top seven candidates in part because his "background was based on laboratory experiences" rather than the field-research experience that CARC desired, Pet. App. 15a. Finally, it found that Keys's score reflected only one completed evaluation form, filled out by Griffin, and that it was unclear whether other search-committee members had evaluated Keys. *Id.*

Shakir complained to the University's Provost that the faculty committee's conclusions were vague and non-explanatory. *Id.* He challenged the committee's reliance on the distinction between laboratory and field research and the fairness of Keys's selection based on one written evaluation. *Id.* Shakir asked for a copy of Keys's résumé and the search committee's meeting minutes. *Id.* He also requested that his employment status be changed from Instructor to Tenured Faculty. *Id.*

2. After the University denied his requested change in employment status, Shakir filed this action against the University, the Texas A&M University System, and the State of Texas (collectively, "the University"). *Id.*, at 2a. Shakir alleged that the University had discriminated against him on the basis of his race and national origin by failing to select him for the Agronomist position, by paying him less than similarly situated faculty

members, and by failing to award him tenure, all in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, and the Texas Commission on Human Rights Act, TEX. LAB. CODE §21.252, *et seq.* The University filed a motion for summary judgment on these claims, Pet. App. 3a, 16a, which the district court granted, *id.*, at 33a.

With respect to Shakir's claim based on the University's selection of Keys instead of him for the Agronomist position, the district court concluded that Shakir had established a prima facie case of discrimination and that the University had proffered a legitimate, non-discriminatory reason for its actions: Keys more closely conformed to the position's requirements. *Id.*, at 19a-20a. Thus, the dispositive question was whether Shakir had presented competent summary-judgment evidence that created a genuine issue of material fact as to whether the University's reason was merely a pretext for discrimination. *Id.*, at 20a. The court concluded that Shakir had not met this burden because his arguments were either not supported by the record or immaterial. *See id.*, at 21a-28a. In particular, the court determined that "[t]here are simply no glaring differences between the qualifications of the two men," and thus was "unable to conclude that [Shakir's] qualifications were superior to those of Dr. Keys, much less clearly superior." *Id.*, at 27a. Instead, the court viewed Shakir's pretext argument as grounded solely in "his subjective opinion that he was more qualified for the position." *Id.*

The court rejected Shakir's disparate-pay claim on the ground that he was impermissibly comparing his salary as a non-tenured Instructor to tenured Associate Professors—*i.e.*, to persons who were not "similarly situated." *Id.*, at 28a-29a. The court also held that Shakir's complaint for failure to award tenure could not proceed because he failed to exhaust his administrative remedies. *Id.*, at 32a. Finally, the court held that Shakir's state-law claims

were barred by the Eleventh Amendment. *Id.* Shakir appealed. *Id.*, at 2a.

3. In an unpublished, non-precedential decision, the court of appeals affirmed. *Id.*, at 2a, 9a.[2] Like the district court, the court of appeals held that Shakir's pretext arguments were all either not supported by the record or immaterial. *Id.*, at 5a-7a. The court specifically held that Shakir had failed to meet the Fifth Circuit's standard for rebutting an employer's qualification-based reason for an employment decision: that he was "clearly better qualified" than Keys. *Id.*, at 7a-8a. In this regard, the court noted that "unless disparities in curricula vitae are so apparent as virtually to jump off the page and slap us in the face, we judges should be reluctant to substitute our views for those of individuals charged with the evaluation duty." *Id.*, at 7a (quoting *Odom v. Frank*, 3 F.3d 839, 847 (CA5 1993)).

The court of appeals further held that Shakir could not invoke the "mixed motive" analysis for Title VII claims propounded by the Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), because he had failed to present either direct or circumstantial evidence of discriminatory animus. Pet. App. 8a. Specifically, the court determined that evidence that the selection committee members were all African-Americans and that perhaps only one member evaluated Keys did not raise a genuine issue of material fact with respect to the University's motives. *Id.* At most, the court concluded, Shakir had only "imput[ed] a large amount of general unfairness" to the University. *Id.*, at 9a.

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2. *See* 5TH CIR. R. 47.5.4 ("Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like).").

## REASONS TO DENY THE PETITION

### I. THE QUESTION REGARDING THE PROPER STANDARD FOR EVALUATING COMPARATIVE QUALIFICATIONS AS EVIDENCE OF PRETEXT IN TITLE VII CASES DOES NOT WARRANT REVIEW.

Shakir seeks review of the court of appeals's application of the "clearly better qualified" standard in evaluating his summary-judgment evidence of pretext because (1) there is a "stark" conflict among the circuits regarding the proper standard for evaluating comparative qualifications as pretext evidence, Pet. 6, 16; (2) the "clearly better qualified" standard conflicts with the Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), Pet. 13; and (3) the court of appeals's reference to the metaphor that any qualifications disparity must "jump off the page and slap us in the face" conflicts with the Court's decision in *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006), Pet. 8. None of these arguments warrants certiorari review.

#### A. The Circuits Mostly Agree on the Standard for Evaluating Comparative Qualifications as Evidence of Pretext and Any Differences Exist More in Degree than in Kind.

In *Ash*, the Court reaffirmed that, in a Title VII case, "qualifications evidence may suffice, at least in some circumstances" to show that an employer's stated reason for failing to hire or promote the plaintiff was pretextual. 126 S. Ct., at 1197. And although the Court acknowledged that federal courts have "articulated various . . . standards" for evaluating whether such evidence is probative of pretext, it declined "to define more precisely what standard should govern pretext claims based on superior qualifications." *Id.*, at 1197-98.

Shakir incorrectly portrays the circuits' varying standards as a "stark" contrast between (1) a heightened standard—employed by the court of appeals below—in which the plaintiff must show that he was "clearly better qualified" than the person that the defendant hired or promoted; and (2) a purportedly lower "reasonableness" standard in which the plaintiff must present evidence that an "ordinary and reasonable employer" would have hired or promoted him instead. *See* Pet. 16-21. In fact, almost all circuits employ a two-pronged test: If a plaintiff relies *solely* on qualifications evidence to show pretext, then he must show some material disparity in those qualifications—*e.g.*, he was "clearly better qualified"; on the other hand, if a plaintiff relies on qualifications *and* other competent evidence of pretext, he need only show that he was better or comparably qualified. *See infra*, Part I.A.1. And those few circuits that have articulated another test employ standards that differ more in degree than in kind. *See id.* To the extent those differences matter, this case does not present a good vehicle to explore them because Shakir cannot show pretext under *any* standard. *See infra*, Part I.A.2.

**1. The circuits have reached a near-consensus regarding the test for evaluating comparative qualifications as evidence of pretext.**

The First, Second, Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, and District of Columbia Circuits apply the same two-pronged test for evaluating comparative qualifications as evidence of pretext in a Title VII failure-to-hire or failure-to-promote case. If the plaintiff's *sole* evidence of pretext is a comparison of his qualifications to those of the person hired or promoted, the plaintiff must show some material difference in those qualifications—*e.g.*, the plaintiff must be "obviously superior," "significantly better qualified," or "clearly better qualified." On the other hand, if the plaintiff presents comparative qualifications *and* other evidence of pretext—such as evidence that the employer falsified its stated

reason for failing to hire or promote the plaintiff—he need only show that he was merely "better than" or "equally qualified as" the person hired or promoted.[3]

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3. Specifically, these circuits have articulated this generally accepted two-pronged test as follows:

**First Circuit**: Comparative qualifications alone may be evidence of pretext if "the difference in qualifications is so stark as to support an inference of pretext" such that the plaintiff's qualifications are "obviously superior" to a successful applicant. *See Rathbun v. Autozone, Inc.*, 361 F.3d 62, 75 (CA1 2004) (citing *Deines v. Tex. Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 282 (CA5 1999)). But "a claimed difference in qualifications may be sufficient to ground an action if accompanied by independent evidence (say, evidence of pretext or discriminatory animus)." *Id.*

**Second Circuit**: "When a plaintiff seeks to prevent summary judgment on the strength of a discrepancy in qualifications ignored by an employer . . . the plaintiff's credentials would have to be so superior to the credentials of the person selected for the job that 'no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.'" *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 103 (CA2 2001) (quoting *Deines*, 164 F.3d at 280-81). In *Byrnie*, the court of appeals held that, while the plaintiff's qualifications evidence did not meet this standard, additional evidence showing the employer's explanation lacked credence allowed the plaintiff to survive summary judgment. *See id.*, at 103-04.

**Fourth Circuit**: "When a plaintiff asserts job qualifications that are similar or only slightly superior to those of the person eventually selected, the promotion decision remains vested in the sound business judgment of the employer. But where . . . the plaintiff has made a strong showing that his qualifications are demonstrably superior, he has provided sufficient evidence that the employer's explanation may be pretext for discrimination." *Heiko v. Colombo Sav. Bank*, 434 F.3d 249,

261-62 (CA4 2006). At the same time, "an equally valid way to prove pretext is to provide evidence that the employer's proffered reason was not the actual reason relied on, but was rather a false description of its reasoning—albeit one based on a real difference in qualifications—manufactured after the fact." *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 648 n.4 (CA4 2002).

**Fifth Circuit**: A plaintiff can demonstrate that an employer's asserted justification for its hiring decision was pretext by showing he was "clearly better qualified" for the position. *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 882 (CA5 2003). But this standard applies only when the plaintiff "attempt[s] to prove pretext solely on the basis of her comparative qualifications." *See Rutherford v. Harris County*, 197 F.3d 173, 182 n.9 (CA5 1999); *see also Sanders v. Anadarko Petroleum Corp.*, 108 Fed. Appx. 139, 143 (CA5 2004) ("If, however, a plaintiff relies on comparative qualifications alone, she must present evidence that she is clearly better qualified than those individuals who were hired."). "A plaintiff may also establish pretext by presenting evidence that the employer's proffered explanation is false or unworthy of credence . . . ." *Sanders*, 108 Fed. Appx., at 143.

**Sixth Circuit**: "[E]vidence that a rejected applicant was as qualified or marginally more qualified than the successful candidate is insufficient, in and of itself, to raise a genuine issue of fact that the employer's proffered legitimate, non-discriminatory rationale was pretextual." *Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 627 (CA6 2006). That is, "to survive summary judgment the rejected applicant's qualifications must be so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former." *Id.* On the other hand, when "a plaintiff does provide other probative evidence of discrimination, that evidence, taken together with evidence that the plaintiff was as qualified as or better qualified than the successful applicant, might well result in the plaintiff's claim surviving summary judgment." *Id.*, at 626-27.

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**Seventh Circuit**: "[W]here an employer's proffered non-discriminatory reason for its employment decision is that it selected the most qualified candidate, evidence of the applicants' competing qualifications does not constitute evidence of pretext 'unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue.'" *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1180 (CA7 2002). In adopting this standard, the court of appeals distinguished cases in which "there was additional evidence of discrimination." *Id.*, at 1179.

**Tenth Circuit**: "[P]retext cannot be shown simply by identifying minor differences between plaintiff's qualifications and those of successful applicants. The disparity in qualifications must be 'overwhelming' to be evidence of pretext." *Bullington v. United Airlines, Inc.*, 186 F.3d 1301, 1319 (CA10 1999) (internal citations omitted), *overruled on other grounds by AMTRAK v. Morgan*, 536 U.S. 101 (2002). However, "a plaintiff can show the proffered nondiscriminatory justification that the plaintiff was not the most qualified candidate is a pretext by . . . presenting evidence that he was comparably qualified accompanied by other evidence of discrimination." *Voltz v. Coca-Cola Enters.*, 91 Fed. Appx. 63, 73 (CA10 2004).

**Eleventh Circuit**: "[W]here an employee seeks to prove pretext through qualifications alone, the difference in qualifications must be so glaring that no reasonable impartial person could have chosen the candidate selected for the promotion in question over the plaintiff. However, where the qualifications disparity is not the *sole* basis for arguing pretext, the disparity need not be so dramatic to support an inference of pretext." *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 772 (CA11 2005) (per curiam) (internal citations omitted).

**D.C. Circuit**: The court has explained that a plaintiff can establish pretext "[i]f a factfinder can conclude that a reasonable employer would have found the plaintiff to be significantly better qualified for the job."

The sound rationale for this test is that courts and juries should generally defer to employers' business judgment regarding which applicant is best qualified for a position or promotion, unless (1) the disparity in qualifications is so great that even someone without business expertise would question whether the employer's decision was truthful or (2) there is evidence beyond comparative qualifications that tends to show the employer's qualifications-based reason is not credible. The Seventh Circuit aptly explained why a marked difference in qualifications is necessary to survive summary judgment if that is the only evidence of pretext:

> "If we were to allow a jury to evaluate competing credentials to determine whether the employer's assertion that it selected the best candidate was pretextual, the jury would in most cases be replacing the employer's personnel department. Yet neither the judge nor the jury is 'as well suited by training and experience to evaluate qualifications for high level promotion in other disciplines as are those persons who have trained and worked for years in that field of endeavor for which the applications under consideration are being evaluated.'" *Millbrook*, 280 F.3d, at 1181 (quoting *Odom v. Frank*, 3 F.3d 839, 847 (CA5 1993)).

Emphasizing the second prong of the test, the District of Columbia Circuit has recognized that, even when a plaintiff cannot show a qualifications disparity so great as to support an inference of pretext, there may be other evidence of "flaws in the employer's

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*Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1294 (CADC 1998). At the same time, "[a] plaintiff attacking a qualifications-based explanation is of course not limited to comparing his qualifications against those of the successful candidate." *Id.*, at 1295. If the plaintiff presents "adequate evidence" that "expose[s] other flaws in the employer's explanation," an inference of pretext may result. *Id.*

explanation." *Aka*, 156 F.3d, at 1295. "For example, the plaintiff can attempt to show that the employer's explanation was fabricated after the fact by showing that it contradicts other contemporaneous accounts of the employer's decision. Or a plaintiff can attempt to show that the employer's explanation misstates the candidates' qualifications." *Id.* The two-pronged test employed by most circuits accounts for both types of evidence without untenably placing courts in the role of a "'super personnel department' that second-guesses employers' business judgments." *Millbrook*, 280 F.3d, at 1181 (quoting *Simms v. Oklahoma*, 165 F.3d 1321, 1330 (CA10 1999)).

The Ninth Circuit has articulated the same standard, holding that a plaintiff's "clearly superior" qualifications, standing alone, may be sufficient to show pretext. *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1194 (CA9 2003) (noting that evidence of a "pronounced difference" in qualifications raised a genuine issue of material fact as to pretext). But that court opined that its threshold for "clearly superior" qualifications was not as high as that of the Fifth and Tenth Circuits, which, prior to *Ash*, had employed the "jump off the page" metaphor to describe the requisite disparity. *Id.* Now that *Ash* has removed this distinction, it is more likely that the Ninth Circuit's "clearly superior" standard aligns with the Fifth Circuit's "clearly better qualified" standard and similar tests applied by most circuits when qualifications are the only evidence of pretext. And like those circuits, the Ninth Circuit also permits plaintiffs to show pretext through evidence beyond disparate qualifications. *Id.*, at 1194-95 (noting that "there are numerous other bases upon which a trier of fact could infer pretext").

The Third Circuit apparently has not developed distinct tests for evaluating pretext evidence based on qualifications alone and qualifications accompanied by other proof. Instead, that court has

developed a general test governing all types of evidence a plaintiff may marshal to demonstrate pretext:

> "[T]o survive summary judgment, [a plaintiff has] either (i) to present sufficient evidence to meaningfully throw into question, i.e., to cast substantial doubt upon, the [employer's] proffered reasons for not hiring him (e.g., by painting them as weak, implausible, contradictory, or incoherent), or (ii) to come forward with sufficient evidence from which a factfinder could reasonably conclude that an illegitimate factor more likely than not was a motivating or determinative cause of the adverse employment decision (e.g., by showing that the employer in the past had subjected him to unlawful discriminatory treatment, that the employer treated other, similarly situated persons not of his protected class more favorably, or that the employer has discriminated against other members of his protected class or other protected categories of persons)." *Fuentes v. Perskie*, 32 F.3d 759, 765 (CA3 1994) (citations omitted).

Though worded differently, this standard likely would yield the same results as the two-pronged test used by most circuits when applied to qualifications evidence. That is, the Third Circuit probably would not hold that slight differences in qualifications, standing alone, "cast substantial doubt upon" an employer's explanation that it hired the best qualified candidate. *See id.* Indeed, that court has held that disparities in two candidates' performance evaluations in some categories did not create a genuine issue of fact that the employer's selection of the lower-evaluated candidate based on his other managerial skills was pretextual. *Healy v. N.Y. Life Ins. Co.*, 860 F.2d 1209, 1217 (CA3 1988).

Finally, the Eighth Circuit has stated that a plaintiff may demonstrate pretext based on "an employer's selection of a less qualified candidate." *Kincaid v. City of Omaha*, 378 F.3d 799, 805

(CA8 2004). This "less qualified" standard superficially appears to be lower than most circuits' requirement of a material disparity in qualifications. At the same time, however, the Eighth Circuit has justified this standard in language almost identical to that used by other circuits to explain why a substantial difference in qualifications is required: "[T]he employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers." *Id.* (quoting *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (CA8 1995)); *cf. Byrnie*, 243 F.3d, at 106; *Bender*, 455 F.3d, at 627; *Millbrook*, 280 F.3d, at 1181. If the Eighth Circuit indeed defers to employers' business judgments and disclaims any role as a "super-personnel department," it seems doubtful that it would approve a showing of pretext based solely on a slight or unclear disparity in qualifications. Indeed, in at least one case, after reciting the "less qualified" standard, the Eighth Circuit ultimately rejected the plaintiffs qualifications-based pretext evidence because it failed to show that the person hired was "*substantially* less qualified." *Duffy v. Wolle*, 123 F.3d 1026, 1038 (CA8 1997) (emphasis added).[4]

In light of these precedents, Shakir widely misses the mark in his assessment of the circuits' standards. He claims "confusion" regarding whether circuits permit a plaintiff to demonstrate pretext using qualifications alone, Pet. 11, when, as shown, all circuits allow such a showing. He also erroneously claims that some circuits evaluate pretext evidence using a "reasonableness standard" that is a "modification of the business judgment rule." Pet. 16. To the contrary, these circuits use the business judgment rule to *justify* the material-disparity standard that Shakir challenges. For example,

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4. As with all other circuits, the Eighth Circuit also permits plaintiffs to show pretext with evidence other than comparative qualifications. *See Duffy*, 123 F.3d, at 1038-40.

the First Circuit has explained that "proof of competing qualifications will seldom, in and of itself, be sufficient to create a triable issue of pretext"—a result that "follows from a form of the business judgment rule" because courts should defer to employers' personnel decisions in most cases. *Rathbun*, 361 F.3d, at 74. This deference yields only in "situations in which the difference in qualifications is so stark as to support an inference of pretext." *Id.*, at 75. Shakir's inaccurate analysis of circuit precedent directly informs his erroneous conclusion that these courts' standards for evaluating pretext evidence are in "stark conflict." Pet. 6.

In fact, any conflict among the circuits' standards in this area is, at best, extremely lopsided, with nine of twelve circuits employing the same two-pronged test to evaluate pretext evidence based on qualifications alone and qualifications plus other proof of falsity. The remaining three circuits' standards differ more in degree than in kind and, in most cases, it is unlikely that application of those circuits' standards would yield different outcomes. Accordingly, whatever slight and vague distinctions may exist between the Third, Eighth, and Ninth Circuits' tests and the majority rule, they do not present an "important" conflict that merits certiorari review. *See* SUP. CT. R. 10.

**2. Shakir's case is a poor vehicle for resolving any differences among the circuits' standards.**

Even if the Court were interested in addressing any differences in the circuits' standards for evaluating comparative qualifications as pretext evidence, Shakir's petition is a poor vehicle for doing so. Shakir cannot show that he would survive summary judgment under *any* circuit's standard.

The University's legitimate, non-discriminatory reason for hiring Keys instead of Shakir was that the three highest-ranked candidates were either no longer interested or unavailable, Keys was ranked fourth, and Shakir was ranked nineteenth. Pet. App. 3a,

12a; R.329. Shakir first attempted to show that this reason was pretextual based on arguments that the hiring process was skewed in favor of Keys. Pet. App. 5a. The court of appeals concluded, however, that these contentions either were not supported by the record or were immaterial to the University's proffered reason. *Id.*, at 5a-7a.

Shakir's only remaining summary-judgment evidence of pretext was his allegedly superior qualifications. Pet. App. 7a. The district court had thoroughly reviewed Shakir's and Keys's qualifications and determined that "[t]here are simply no glaring differences between the qualifications of the two men." Pet. App. 27a. Consequently, the district court had been "unable to conclude that [Shakir's] qualifications were superior to those of Dr. Keys, much less clearly superior." *Id.* The Fifth Circuit similarly held that Shakir's particular strengths did not render him more qualified than Keys in light of the wide-ranging applicant criteria listed in the Agronomist job posting. *Id.*, at 7a. Indeed, the evidence showed that Keys was a better fit for the position than Shakir in light of the former's field-research experience. *See id.*, at 3a, 15a. Shakir also never accounts for the fact that there were fourteen additional applicants ranked above him; they presumably would have been in line for the position ahead of Shakir had Keys not accepted. *See id.*, at 3a, 13a.

Given that Shakir failed to raise a fact issue as to whether he was even marginally better qualified than Keys, Shakir would not have defeated the University's summary-judgment motion in *any* circuit—even one that does not require a material disparity in qualifications evidence. For this reason, Shakir's petition would not be an effective vehicle for the Court to resolve any differences in the circuits' standards for evaluating comparative qualifications as proof of pretext.

### B. When a Title VII Plaintiff's Sole Evidence of Pretext Is Comparative Qualifications, Requiring a Showing of Material Disparity in Those Qualifications To Defeat Summary Judgment Does Not Conflict with the Court's Decision in *Reeves*.

Shakir also incorrectly asserts that the court of appeals's application of the "clearly better qualified" standard conflicts with the Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Pet. 13-16. That standard addresses a different stage of a Title VII plaintiff's proof than *Reeves*'s holding and does not conflict.

In *Reeves*, the Court addressed a circuit conflict regarding whether a plaintiff, having already survived summary judgment by establishing a prima facie case of discrimination and presenting sufficient evidence that the employer's proffered reason was pretextual, nevertheless had to introduce additional, independent evidence of discrimination to prevail on his claim. 530 U.S., at 140-41. The Court held that such additional evidence was not necessarily required because a jury could infer unlawful discrimination from a combination of the plaintiff's prima facie case and his pretext evidence. *Id.*, at 148-49.

Shakir contends that any requirement that a plaintiff show a material disparity in qualifications evidence at the summary-judgment stage to show pretext amounts to a demand for additional evidence of discrimination that is prohibited under *Reeves*. Not so. As discussed *supra*, when a plaintiff relies solely on qualifications evidence to show pretext, most circuits require a showing of substantial difference in qualifications because comparable or only slightly better qualifications are as likely to be probative of an ordinary business judgment as they would give rise to an inference of falsity. *See supra*, Part I.A.1. In other words, a mere showing that the plaintiff is better qualified is insufficient evidence of

pretext. *Reeves* does not come into play until the plaintiff has already shown sufficient evidence of pretext (and a prima facie case). 530 U.S., at 147-48. At *that* point, *Reeves* dictates that the plaintiff need not present more evidence of discrimination to prove liability. Thus, a "clearly better qualified" standard and *Reeves* address different aspects of a plaintiff's proof and do not conflict.

Shakir misplaces reliance on Judge Dennis's special concurrence in *Manning v. Chevron Chemical Co.*, 332 F.3d 874 (CA5 2003), as support for his argument that the "clearly better qualified" standard conflicts with *Reeves*. Pet. 13. Judge Dennis acknowledged that, if the "clearly better qualified" test were applied *only* as a standard for determining whether the plaintiff had presented sufficient evidence of pretext, such an application would accord with *Reeves*. *See* 332 F.3d, at 885 (Dennis, J., specially concurring). Judge Dennis expressed concern, however, that the Fifth Circuit had previously described the "clearly better qualified" test as a metric for proving the "ultimate fact" of discrimination—an application that would arguably contradict *Reeves*. *Id.* In this case, the court of appeals used the "clearly better qualified" test only to determine whether Shakir had presented sufficient evidence of pretext to survive summary judgment, Pet. App. 7a, which does not implicate Judge Dennis's concern about *Reeves*.

Shakir also misconstrues the Fourth Circuit's decision in *Dennis v. Columbia Colleton Medical Center, Inc.*, 290 F.3d 639 (CA4 2002), as repudiating a heightened standard for pretext evidence in light of *Reeves*. Pet. 14-15. Prior to *Reeves*, the Fourth Circuit had held that a Title VII plaintiff must always show that he is better qualified than the person hired or promoted not merely to show pretext, but also ultimately to prove liability. *Evans v. Techs. App. & Serv. Co.*, 80 F.3d 954, 960 (CA4 1996). In *Dennis*, the Fourth Circuit recognized that this requirement conflicted with *Reeves* because a plaintiff could conceivably show pretext through non-qualifications evidence and that showing, combined with a prima

facie case, would support liability without any proof of superior qualifications. 290 F.3d, at 648 n.4. The Fourth Circuit recognized, however, that such a case would be distinguishable from situations where the plaintiff's *only* competent pretext evidence was comparative qualifications and a material disparity in those qualifications is required. *Id.*, at 648 (distinguishing *Deines*, 164 F.3d, at 280-81). Moreover, since the Court issued *Reeves*, the Fourth Circuit has continued to require a showing of "demonstrably superior" qualifications when that is the sole evidence of pretext. *Heiko,* 434 F.3d, at 261-62.

### C. The Court of Appeals's Reference to the "Slap in the Face" Metaphor Disapproved in *Ash* Was at Most Harmless Error.

Shakir further argues that the Court should grant certiorari because the court of appeals's statement that any qualifications disparity should be so apparent as to "jump off the page and slap us in the face," Pet. App. 7a, conflicts with the Court's recent decision in *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006). Pet. 7-8. In light of *Ash*, the court of appeals did err in referring to this metaphor, but this error was harmless.

In *Ash*, the Court disapproved use of the "jump off the page" metaphor "as an *elaboration* of the standard for inferring pretext from superior qualifications." 126 S. Ct., at 1197 (emphasis added). But the Court expressly did not disapprove the standards themselves, citing as representative examples: (1) "disparities in qualifications must be of such weight and significance that no reasonable person . . . could have chosen the candidate selected over the plaintiff for the job in question"; (2) "qualifications evidence standing alone may establish pretext where the plaintiff's qualifications are 'clearly superior' to those of the selected job applicant"; and (3) "the factfinder may infer pretext if 'a reasonable employer would have found the plaintiff to be significantly better

qualified for the job.'" *Id.*, at 1197-98 (citing, respectively, *Cooper v. Southern Co.*, 390 F.3d 695, 732 (CA11 2004); *Raad*, 323 F.3d, at 1194; *Aka*, 156 F.3d, at 1294). And since *Ash* was decided, several courts of appeals have affirmed that *Ash* did not disturb their requirements for showing a material disparity in qualifications evidence to demonstrate pretext. *See, e.g.*, *Kearney v. County of Rockland*, 185 Fed. Appx. 68, 69-70 (CA2 2006) (employing the requirement that plaintiff's qualifications must be "so superior" that "no reasonable person" could have chosen the candidate selected over the plaintiff); *Bender*, 455 F.3d, at 627 (commenting that Sixth Circuit's "significantly better qualified" test comports with standards cited in *Ash*); *Mlynczak v. Bodman*, 442 F.3d 1050, 1059-60 (CA7 2006) (concluding that "nothing in *Ash* . . . requires reconsideration of [our] approach to qualifications evidence"); *Ash v. Tyson Foods, Inc.*, No. 04-11695, 2006 WL 2219749, at *3 (CA11 Aug. 2, 2006) (confirming on remand that Eleventh Circuit's heightened standard for disparity in qualifications remains in effect).

Thus, notwithstanding the court of appeals's reference in a non-precedential opinion to the "jump off the page" metaphor, it correctly applied the Fifth Circuit's "clearly better qualified" standard for pretext evidence based solely on qualifications. Pet. App. 7a. As discussed *supra*, Shakir failed to show that he was merely better qualified than Keys, much less raise a fact issue as to whether he was "clearly better qualified." *See supra*, Part I.A.2. Consequently, any conflict with *Ash* was harmless error and does not warrant review.

## II. THE COURT OF APPEALS'S MIXED-MOTIVE ANALYSIS DOES NOT CONFLICT WITH THE COURT'S DECISION IN *DESERT PALACE*.

In addition to his arguments regarding the assessment of his pretext evidence, Shakir also complains that the court of appeals's

mixed-motive analysis conflicts with the Court's decision in *Desert Palace v. Costa*, 539 U.S. 90 (2003). Pet. 21-28. In fact, Shakir misreads the court of appeals's opinion and no conflict exists on this issue.

Under the 1991 amendments to Title VII, a plaintiff may establish liability if he can show that unlawful discrimination was a motivating factor for the challenged employment decision even if the employer was also motivated by other factors. 42 U.S.C. §2000e-2(m). As an affirmative defense to damages for such liability, an employer may show that it would have taken the same action in the absence of the impermissible motivating factor. *Id.*, §2000e-5(g)(2)(B). In *Desert Palace*, the Court simply clarified that a plaintiff can invoke the mixed-motive analysis by presenting sufficient *direct or circumstantial* evidence of a discriminatory motive. 539 U.S., at 98-102.

Shakir contends that the court of appeals's decision conflicts with *Desert Palace* based on language in a footnote in the opinion: "The mixed-motive theory 'comes into play where direct evidence of discrimination is presented, but the employer asserts that the same adverse employment decision would have been made regardless of discrimination.'" Pet. App. 10a n.2 (quoting *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 309 (CA5 2004)). Shakir incorrectly reads this statement to mean that the court of appeals permits a plaintiff to proceed on a mixed-motive theory *only* when he proffers direct evidence of discrimination. *See* Pet. 21-22 & n.12. Any such inference is plainly rebutted by the court's recitation of the correct standard in the body of its opinion: "A plaintiff may plead the mixed-motive alternative using *either direct or circumstantial evidence* of animus." Pet. App. 8a (citing *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 340 (CA5 2005)) (emphasis added). The court correctly concluded that Shakir's evidence—the racial composition of the selection committee and the existence of one scoring sheet for Keys—was insufficient direct

or circumstantial evidence of intentional racial discrimination to survive summary judgment. *Id.*, at 8a-9a. This case presents no conflict with *Desert Palace*.

Shakir also raises questions about the continued applicability of the *McDonnell Douglas* burden-shifting framework in Title VII cases after *Desert Palace*. Pet. 22-25. But as Shakir concedes, there is no circuit conflict on this question. Pet. 22. Moreover, Shakir acknowledges that the Court has reaffirmed the *McDonnell Douglas* framework since it issued its decision in *Desert Palace*. *Id.* (citing *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003)). In the absence of any conflict among the courts of appeals or the relevant decisions of this Court, this issue does not warrant review. *See* SUP. CT. R. 10.

## III. SHAKIR'S ASSERTION THAT THE FIFTH CIRCUIT MISAPPLIED THE SUMMARY-JUDGMENT STANDARD DOES NOT WARRANT REVIEW.

Finally, Shakir asserts that the court of appeals departed from the accepted and usual course of judicial proceedings by failing to consider certain evidence, failing to construe evidence in Shakir's favor, and making credibility determinations. Pet. 28-29. In other words, Shakir claims that the court misapplied the summary-judgment standard under Federal Rule of Civil Procedure 56. *See* FED. R. CIV. P. 56(c). But Shakir's arguments amount to nothing more than subjective disputes regarding the significance of his qualifications relative to other applicants, the ranking of certain applicants, and the probative value of minutiae such as an arrow drawn next to Shakir's name on a scoring sheet. *See* Pet. 24-25 n.13. Addressing these arguments would mire the Court in a detailed record and numerous questions about the appropriate weighing of the twenty-six applicants' qualifications. This fact-bound inquiry does not warrant certiorari review.

## CONCLUSION

The Court should deny the petition for writ of certiorari.

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IN THE

# Supreme Court of the United States

SAFWAT H. SHAKIR, PETITIONER

*v.*

PRAIRIE VIEW A&M UNIVERSITY; TEXAS A&M UNIVERSITY SYSTEM; STATE OF TEXAS,

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## REPLY BRIEF

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Prairie View A & M University ("University") is unable to dispute, in *any* fair fashion, the salient qualifications difference between Shakir and Keys, the candidate ultimately selected to fill the agronomist position. Nor can the University legitimately dispute the injustice perpetrated by the effect of employing the "clearly better qualified" standard in this case. If anything, ignoring the falsity of the disparity in the qualifications evidence, permissible by way of the "clearly better qualified" standard, sets a difficult bar for plaintiffs to overcome and deeply masks the pretextual nature of the numerical ranking administered by the University that resulted in a low ranking of Shakir.

The University's opposition is tantamount to parsing of words in an attempt to explain away the genuine conflict created by the variety of undefined standards employed by the circuit courts. *Shakir* warrants review because every employer in this country on any given day evaluates and compares candidates for a job, whether in form or substance, on the basis of the qualification parameters prescribed by the employers. Yet, today, the Fifth Circuit and most other circuits would leave out the comparative qualifications analysis from the pretext consideration under the *McDonnell Douglas* paradigm, unless a plaintiff is able to demonstrate that he or she is a "clearly better qualified" candidate, however that standard is defined and applied by each court. Such evidentiary burden is unfair to the aggrieved and far too heavy to be permissible under the Title VII framework of law enacted by Congress. *Reeves* unequivocally and simply recognized that a defendant's explanation for any employment practice which is "unworthy of credence" is "one form of circumstantial evidence that is probative of intentional discrimination." The "clearly better qualified" or a similar standard is an untenable barrier to fulfilling the inquiries prescribed by *Reeves*.

The logic behind the judicial policy of the "clearly better qualified" standard, initiated by the Fifth Circuit in *Deines*, is based on the rationale that the comparison of candidates for jobs should be left to the judgment of the businessman or that it should not be in the province of either the court or the jury. While such practice has well intended justifications, the logic behind the practice is fundamentally flawed and defies common sense because any employment decision-making process that leaves the judgment entirely up to the businessman can be explained by the employer as being made for a nondiscriminatory reason at any time, justified or not. Therefore, such explanation should be subject to the pretext analysis as contemplated by *Reeves*. In that regard, *Deines* is logically inconsistent with *Reeves* because by imposing a heightened "clearly better qualified" standard, the former prohibits the pretext analysis of a significant part of the employer's decision-making process, leaving a void, while the latter holds in an all-encompassing way that a reasonable factfinder may consider any direct or circumstantial evidence in rejecting the employer's nondiscriminatory reason for its decision.

Moreover, because of the existing logical inconsistency, the very wisdom of not challenging the businessman's latitude in making personnel decisions in the context of the pretext analysis must be seriously debated. As the law currently stands, the mythical "businessman" has the option and the power to "do the right thing" or to abuse his power unlawfully in making his employment decisions. A decision for hiring or promotion of candidates based on their comparative qualifications in the hands of a businessman is no more and no less susceptible to pretext and masking than any other reason an employer may provide to explain the employment decision and therefore, not immune from unlawful discrimination in violation of Title VII.

In this case, the numerical ranking administered by the University based on the comparative qualifications among the candidates was pretextual in and of itself and

undermined the employer's nondiscriminatory explanation. The resulting anomalies in the ranking were sufficient to demonstrate the falsity of the University's explanation as to why Shakir ranked far below the selected candidate. Therefore, the ranking process alone provided the requisite proof of falsity under *Reeves* for summary judgment purposes, without the unnecessary imposition of the heightened "clearly better qualified" standard that created an impermissible evidentiary barrier for Shakir. The University has failed to demonstrably justify any underlying logic or articulate a reason for this heightened evidentiary barrier and explain why it should not be demolished other than because most circuits follow this questionable standard.[1]

## I. REVIEW IS NECESSARY BECAUSE THE CIRCUITS ARE IN VARYING DEGREES OF CONFLICT

### a. THE COURT'S *ASH V. TYSON* DECISION IS NOT MERELY CONFORMING TO A TECHNICALITY

Contrary to the University's argument, a failure to follow *Ash* is not harmless error because conforming to that decision is not merely a metaphor or a technical formality. Opp. Br. 21. *Ash* expressly stated that "qualification evidence may suffice, at least in some circumstances, to show pretext." 126 S. Ct. at 1197 (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88, 109 S. Ct. 2363, 105 L.Ed.2d 132 (1989)). However, the University acknowledged that several circuit decisions *post-Ash* did not disturb the *pre-Ash* decisions in varying degrees of "superior," "significantly better qualified" or such similarly heightened standards. The continued application of the varying standards invites

[1] In the event that the Court does not grant certiorari in this case, Shakir respectfully requests that the Court vacate the decision below and remand the case with specific instructions to the Fifth Circuit to review the pretext standard in light of the Supreme Court's holding in *Ash*.

inconsistent results and warrants this Court's intervention at this time to avoid further anarchy in this area of law. *See* Opp. Br. 22.

### b. CERTIORARI IS NEEDED TO RESOLVE THE CONFLICT AMONG THE COURTS OF APPEAL AND BECAUSE THE ISSUE IS IMPORTANT AND RECURRING

#### i. Differing Standards in Other Courts of Appeal

The fundamental question that begs this Court's attention is whether the comparative qualifications evidence alone may show pretext for the purpose of the *McDonnell Douglas* paradigm.[2] The nature of the problems posed in the area of the comparative qualifications evidence among the circuits is multi-faceted: (1) the definitions of "clearly superior," "clearly better qualified," "significantly better qualified" or similar standards employed by the circuits do not provide the requisite clarity and obscure the real underlying issues; (2) the subjective and objective factors frequently used in the analysis are shifting without a solid anchoring basis; and (3) inconsistent results abound in the attempts at resolving the question of whether the comparative qualifications evidence *alone* is enough to show pretext for intentional discrimination. With regard to the last issue, the irreconcilable complexity of stances taken by the courts of appeals is demonstrated by the Eleventh Circuit which apparently adopted the "jump off the page and slap you in the face" standard prior to this Court's decision in *Ash* but still

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[2] Shakir's position has always been that he has established his prima facie case and provided the circumstantial evidence showing that the employer's explanation for his non-selection was pretext. Thus, he has not relied solely on the comparative qualifications evidence to show pretext.

agrees with the Ninth Circuit's position that qualification evidence alone is sufficient for pretext determination.[3]

Moreover, given the absence of unanimity among the circuits on the treatment of the comparative qualifications evidence, even the University may concede that, at a minimum, the Third, Eight, and Ninth[4] Circuits have each applied a different standard that is less strict than the "clearly better qualified" standard employed by some of the other circuits. While this Court in *Ash* did not expressly disapprove of the various standards applied by the circuits, nonetheless, the Court noted the existence of "various other standards," and stated that "[i]t suffices to say here that some formulation than other than the test the Court of Appeals articulated in this case would better ensure that trial courts reach consistent results." 126 S. Ct. at 1198. Even a solid effort to comply with *Ash* appears to end in a struggle to balance the competing interests.[5] However, perhaps all that should be necessary for the plaintiff to show pretext is to produce "the evidence [that] must be of sufficient significance itself to call into question the honesty of the employer's explanation." *Bender,* 455 F.3d at 627. Such evidentiary standard appears to suggest compliance with the requirements of *Reeves*.

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[3] *Cooper v. Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004) (noting that pretext can be shown by comparing qualifications only when the disparity is "so apparent" by using the "jump off the page and slap you in the face").

[4] *Raad v. Fairbanks North Star Borough School Dist.*, 323 F.3d 1185 (9th Cir. 2003) (holding that qualification evidence standing alone may establish pretext where the plaintiff's qualifications are "clearly superior" to those of the selected job applicant); *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1033 (9th Cir. 2006) (citing *Ash* for the proposition that qualification evidence may alone suffice to show pretext); the Third Circuit had not developed a standard.

[5] *See Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 626-28 (6th Cir. 2006).

Consistent with *Reeves*, the facts in *Shakir* permit a reasonable factfinder to question the honesty of the employer's explanation and strongly suggest that the University's use of the comparative qualifications evidence was a pretext for unlawful discrimination. The pretext is evident in (1) the ranking process itself, which appeared to have circumvented the conventional comparison of qualifications; (2) the anomalies in the "review" of the top candidates; (3) the single-race composition of the selection committee; (4) the process of the ultimate selection of the candidate, including whether the decision was made by the chair of the selection committee alone or with the participation of the other members; and (5) other factors that suggest inconsistencies in the University's selection process. The businessman's judgment should be at the very heart of the pretext inquiry and evidentiary considerations, which are no less susceptible to intentional discrimination than any other consideration or method used by the employer to make its employment decisions.

On any given day, every employer selects from a pool of candidates a person for a job on the basis of ostensibly honest evaluation of the candidates' relative qualifications. Such employer evaluations should not enjoy a special protection from the inquiry into the truthfulness or the falsity of the employer's explanation than the reasons for any other employment decision an employer makes. Therefore, this case has important ramifications for all employers, including the nation's colleges and universities.

### ii. The Heightened Evidentiary Standard Is Inconsistent with *Reeves*

The University's position that "*Reeves* do not come into a play until the plaintiff has already shown sufficient

evidence of pretext (and a prima facie[6] case)" is simply a misconstruction of *Reeves* and a misunderstanding of the role of pretext evidence in the *McDonnell Douglas* burden shifting analysis. *See* Opp. Br. 20. In connection with the *McDonnell Douglas* paradigm, qualifications evidence is relevant for *any* purpose of demonstrating whether sufficient evidence of pretext exists for summary judgment purpose, **not after** the plaintiff has already shown evidence of pretext, as the University claims. Thus, according to *Reeves*, any direct or circumstantial evidence of pretext, including the qualifications evidence that is sufficient to show pretext, combined with the prima facie case, without regard to the barrier of the "clearly better qualified " standard, is enough to defeat summary judgment. The very point of considering the qualifications evidence for pretext analysis without being confronted with the high hurdle of the "clearly better qualified" standard is at stake here. Most circuits today that employ the heightened qualifications standard for finding of pretext leave out significant evidence of pretext from being considered by the jury and the court. Such practice is unfair, illogical, inconsistent with *Reeves* and, therefore, should be discontinued.

In cases like *Shakir*, by ignoring the comparative qualifications evidence as a pretext for unlawful discrimination under the *McDonnell Douglas* analysis, a vital part of the evidence is overlooked. Thus, the University, while touting its facially neutral ranking process, produced a result that had a devastating impact upon an employee's selection. More importantly, the University's selection process masked serious flaws in its ranking process and permitted it to consider inconsistent qualification factors in its decision. The University is unable to answer how it selected the candidate who had barely five years of experience, had not published any scholarly papers, had

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[6] As noted by the District Court, the parties do not dispute the fact that Shakir has made his prima facie case. Pet. App. 19a-20a.

never taken a leadership role in research, had no research experience for more than twelve years prior to his selection, and had no other significant, demonstrable experience or accomplishment. The University cannot explain or justify the fact that the selected candidate was ranked so much higher than Shakir, a candidate who has more than three times the number of years of research experience than Keys, has published a book and a number of scholarly articles, lectured worldwide, served as a director of the NASA-supported research group and had many other relevant experiences and achievements.

The "clearly better qualified" standard excluded Shakir's pretext evidence involving other unexplainable anomalies in the selection process as well which should have been considered under *Reeves*. Such evidence included the ranking of Shakir's former research assistant higher than Shakir, the ranking of the knowingly unavailable candidates near the top, and the willful ignorance by the selection committee of the fact that the ultimately selected candidate, Keys, doctored his otherwise weak and dubious resume in an attempt to bolster his accomplishments by mimicking some of Shakir's credentials, such as his work with NASA. Additional factors that should have been considered for pretext analysis included the review and ranking of Keys' candidacy after all other candidates have already been ranked, even setting aside the issue of whether a deadline for the position existed or had already passed, and the single-race composition of the selection committee favorable to the chosen candidate, although that in and of itself is not a conclusive factor in determining the pretextual nature of the University's proffered reason for the non-selection of Shakir.

## II. THE FIFTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH *DESERT PALACE*

The University has openly overlooked the obvious argument posited by Shakir that the Fifth Circuit, as noted in

his petition, continues to follow the pre-*Desert Palace* pattern of decisions—that only direct evidence is accepted in determining whether a discriminatory animus exists for mixed motive analysis purposes. *See* Opp. Br. 22-24. This pattern is evident by comparing the Fifth Circuit's pre-*Desert Palace* to the post- *Desert Palace* decisions. *See e.g., Bienkowski v. American Air Lines*, Inc., 851 F.2d 1503, 1506-07 (5th Cir. 1998), and *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004). Such comparison demonstrates that the Fifth Circuit has not changed in any way from the pre-*Desert Palace* days of considering only the direct evidence of discriminatory animus in the mixed motive analysis. Unfortunately, this pattern of rejecting the holding in *Desert Palace* is common and pervasive in other circuits as well. *See* Pet. 20. For that reason alone, this Court should intervene to reiterate and stress again the significance of the Civil Rights Act of 1991[7] and *Desert Palace*.

Thus, despite the University's arguments to the contrary, the Fifth Circuit in *Shakir* failed to consider for the purpose of the mixed-motive analysis the obvious circumstantial evidence that the protected characteristic was a motivating factor in the employer's decision, considering that (1) the employer is a historically predominantly black university; (2) the composition of the selection committee consisted of only black members; and (3) plaintiff's ranking was substantially lower than that of the other applicants who have significantly less research experience and scholarship than he, even ranking lower than his black post-doctoral assistant; and (4) the prima facie case was disregarded. By adducing the forgoing evidence of a motivating factor, it is clear that Shakir has affirmatively established that the University engaged in "an unlawful employment practice." However, the Fifth Circuit completely ignored this evidence.

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[7] 42 U.S.C. § 2000e-2(m).

While ignoring the circumstantial evidence of the discriminatory animus under the *McDonnell Douglas* framework as prescribed by *Reeves*, the Fifth Circuit also rejected Shakir's mixed-motive argument on the basis that he did not produce evidence of any discriminatory comments—in effect, requiring direct evidence of racial animus. Under *Desert Palace*, the court should have considered Shakir's circumstantial evidence of the candidates' comparative qualifications as well as his protected characteristic to determine whether race was a motivating factor in the University's decision.

## III. REVIEW IS ALSO WARRANTED BECAUSE THE FIFTH CIRCUIT MISAPPLIED THE SUMMARY JUDGMENT STANDARD

The University is overlooking the salient fact here: a rational employer would not have selected for a researcher's position at a University a candidate whose relevant experience was one-third that of another, who had published no scholarly articles or books, and had no substantial experience in research leadership.

## CONCLUSION

This Court is the Court of last resort. Petitioner Shakir was wronged by the lower courts' decisions. Shakir respectfully requests that the Court grant review of his petition for writ of certiorari.

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SAFWAT H. SHAKIR, PETITIONER

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PRAIRIE VIEW A&M UNIVERSITY; TEXAS A&M UNIVERSITY SYSTEM; STATE OF TEXAS,

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## PETITION FOR REHEARING

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The United States Supreme Court entered an order denying Shakir's petition for a writ of certiorari on December 4, 2006 in the *Shakir v. Prairie View A&M University*, Docket No. 06-139.

Shakir respectfully requests that this Court defer the reconsideration of its decision on the denial of Shakir's petition for a writ of certiorari in light of the pending petition for a writ of certiorari in *Ash v. Tyson Foods, Inc.*, Docket No. 06-706, scheduled for conference on January 19, 2007, because the two cases present substantially identical issues.

Therefore, Shakir requests that the Court's decision on the denial of the petition of a writ for certiorari in the *Shakir v. Prairie View A&M University* case be deferred until the disposition in the *Ash* case is final.

After *Ash v. Tyson Foods, Inc.* has been finally decided, Shakir respectfully requests that, in accordance with *Ash*, *Shakir* be vacated and remanded to the Fifth Circuit Court of Appeals.

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## CERTIFICATION OF COUNSEL

I, Hak. K. Dickenson certify that this Petition for Rehearing is presented in good faith and not for delay.

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December 19, 2006